Newcomb, Melanie,

Subject: FW: Objection to Settlement - Oakland Fund/Measure AA/ Libby Schaaf, Case No. 19-01.1
Attachments: Ltr. to PEC re Objection to Schaaf Settlement.pdf; Memo_of_Ps_and_As_in_Support_of_First_Amended_Writ_Petition_and_Complaint_signed (2).pdf

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From: Marleen Sacks <[redacted]>
Sent: Monday, September 9, 2024 10:31 PM
To: Russell, Simon <SRussell@oaklandca.gov>; Micik, Ryan <RMicik@oaklandca.gov>
Cc: Marcus Crawley <[redacted]>; Jason Bezis <[redacted]>
Subject: Objection to Settlement - Oakland Fund/Measure AA/ Libby Schaaf, Case No. 19-01.1

> You don't often get email from [redacted]. Learn why this is important

Please see attached letter and supporting documentation.

--

Law Office of Marleen L. Sacks

Marleen L. Sacks
[redacted]

Law Office of Marleen L. Sacks

[redacted]

September 9, 2024

Attn: Simon Russell and Members of Oakland Public Ethics Commission

Sent via email only

Re: Objection to Proposed Settlement – Oakland Fund/Libby Schaaf, Case No. 19-01.1

Dear Mr. Russell and Members of Ethics Commission:

I am writing to formally object to the proposed settlement in the above-referenced matter. The proposed settlement seriously misstates and omits multiple relevant facts and downplays the severity of former mayor Libby Schaaf's violations. It omits multiple factors that should be viewed as aggravating circumstances, and ultimately gives Ms. Schaaf with what amounts to slap on the wrist. Given the actual facts surrounding this matter, and Ms. Schaaf's actual misconduct, a much more serious penalty should be imposed, or the matter should proceed to hearing, for the reasons described in detail below.

In December 2018 and January of 2019, I propounded several Public Records Act requests to the Mayor's office for documents related to Measure AA. I received virtually no documents from Mayor Schaaf, When her office refused to produce documents that I felt existed, I requested mediation, which is authorized by the Municipal Code. Schaaf's office refused to cooperate with the mediation process, for no apparent reason, as documented by the PEC's own files. The limited documents I did receive indicated that City resources were being inappropriately used to promote Measure AA. On that basis, I filed the original complaint with the PEC that resulted in this investigation.

I subsequently sued the City and Schaaf for their failure to comply with the Public Records Act and mediation requirements, and prevailed in the Superior Court earlier this year. As a result of the court's ruling, the City and Schaaf were compelled to turn over 450 separate documents related to Measure AA that they had illegally withheld during the approximately three years of litigation. Some of those documents directly related to the ethics violations mentioned here, including emails related to John Orton. Other documents prove that City employees were using City time and email addresses to promote Measure AA, in violation of the law. During the course of the litigation, I learned that Schaaf had attempted to improperly use her position to

coerce Measure AA opponents to withdraw opposition television ads. This information was provided to the PEC, and ignored.

The background of the litigation, and Schaaf's liability in that litigation, are highly relevant to the issues here, and I believe are being swept under the rug in the interest of getting an expedient settlement. I strongly urge you to take into consideration ALL of the relevant facts. I am attaching a copy of the Points and Authorities that were submitted to the court in support of the lawsuit so that you can see citations to the actual evidence supporting the claims made.

I. Factual Background of Measure AA

In the spring of 2018, then Oakland Mayor Libby Schaaf actively advocated for the City Council to place a $198.00 parcel tax measure on the ballot referred to as the "Children's Initiative." In April, 2018, the Council declined to do so. However, Schaaf continued to advocate for the tax, which ultimately was placed on the ballot for November, 2018, with Schaaf listed as the main author. The parcel tax, known eventually as Measure AA, initially did not pass, receiving less than the 2/3 required vote. Nevertheless, in December, 2018, the City Council certified that the measure had passed, claiming that even though the ballot materials clearly specified that a 2/3 majority was required to pass, the measure had gotten over 50%, which was enough, since they claimed it was actually a "citizens' initiative."

Under current law, 50% is sufficient to pass a "citizens' initiative Measure AA was the subject of a lawsuit filed by the Jobs and Housing Coalition, due to the fact that Measure AA was advertised as a City initiative needing 2/3 to pass, but was later certified as passing by claiming that it was a "citizens' initiative." The City lost in superior court, with the judge ruling that the actions of the City were a "fraud on the voters." However, the appellate court reversed. Since then, another appellate court has ruled that if there is sufficient collusion between government officials and the sponsor initiatives, it would not be considered a true "citizens' initiative," and would require a supermajority to pass. Alliance San Diego v. City of San Diego (2023) 94 Cal.App.5th 419.

As a result of Measure AA passing, homeowners have now been required to pay approximately $30 million a year, all because it was sold as a "citizens' initiative," when in fact it was not. The facts outlined in the proposed settlement reveal that the people behind Measure AA were not "citizens." They were largely government officials, led by Schaaf. The "citizens" were just used as pawns and puppets.

II. My Public Records Act Requests and Schaaf's Refusal To Mediate

In December 2018 and January 2019, I submitted four separate public records requests for documents related to Measure AA, including Request No. 18-4386 (submitted December 12, 2018); Request No. 18-4466 (submitted December 17, 2018); Request No. 18-4523 (submitted December 18, 2018); and Request No. 19-96 (submitted January 6, 2019.) The requests demanded, among other things, all communications between, to or from outside individuals and entities and Oakland officials and employees related to Measure AA. After not receiving all responsive documents, I believed that Schaaf's office was trying to shield the vast majority of responsive documents.

In response to my PRA requests, the City did, however, provide some responsive documents. Some of those documents indicated that City staff (including David Silver and Kyra Mungia) were using City email addresses to openly engage in Measure AA campaigning activities, in violation of state law.[1] For example, on October 7, 2018 (i.e., a month before the election), Mr. Silver used his City email address to email a person encouraging her to sign up to volunteer for the "Yes on Measure AA" campaign. After reviewing these documents, I believed there were likely numerous other records that the City was obligated to produce, but was not producing.

Pursuant to Oakland Municipal Code section 2.20.270(c), any person whose request to inspect or copy public records has been denied "may demand immediate mediation of his or her request with the Executive Director of the Public Ethics Commission….Mediation shall commence no later than ten days after the request for mediation is made, unless the mediator determined the deadline to be impracticable. The local body…or department shall designate a representative to participate in the mediation."

On January 23, 2019, I submitted a formal complaint to the Oakland Public Ethics Commission regarding the City's violations of the Public Records Act due to the City's failure to produce records in a timely manner, and requested mediation. As of May 6, 2019, no mediation had been scheduled. I spoke to PEC staff member Kellie Johnson, who advised me that they were going back and forth with the Mayor's office, and there seemed to be resistance with respect to their willingness to mediate or provide additional documents. Ultimately, the mediation was never held. On June 11, 2019. Ms. Johnson told me that the Mayor's office was not cooperating in communicating with her regarding the mediation and obtaining additional documents. In a memo memorializing her closing out the mediation efforts, Ms. Johnson wrote, "Staff has made multiple efforts… to determine if the Mayor's office has/had responsive documents to no avail." The memo also outlined the efforts Ms. Johnson had made to communicate with the Mayor's office and her chief of staff, noting that the Mayor's office was not responsive, and that the mediation was being dropped "due to the Mayor's seemingly deliberate failure to timely respond and or produce complete responsive documents to the records request." Neither a mediation nor a full hearing before the Public Ethics Commission ever occurred.

III. Documents Produced During Discovery Demonstrate Use of City Resources To Promote Measure AA

After filing suit, I propounded discovery to obtain the documents related to Measure AA that were not produced in response to my CPRA requests. In virtually all of the emails to and from Mayor Libby Schaaf, she used a non-City email address, i.e., [redacted].The emails demonstrate that Schaaf and her "Director of Education" David Silver were working on promoting the Children's Initiative beginning in mid-2017, during regular City work hours, and using other City resources, up to and likely after the election. City employees such as Silver were alternating between City email addresses and personal email addresses seemingly at random. Some were sent during regular City business hours; some were not.

[1] Mungia occupied an office in City Hall but was technically not a City employee, which the City could never explain.

The City argued that because Mayor Schaaf was using a personal email address to conduct Measure AA activities, this evidences "her intent to keep City business and non-City business appropriately separate." This argument made no sense because Schaaf conducted virtually all of her City business using her Gmail account.

There are multiple emails showing City employees used City resources to support and promote Measure AA. For example, on July 20, 2017 at 12:11 p.m., Maggie Croushore, Libby Schaaf's Project Director, Communications and Sustainability, Oakland Promise sent an email to multiple City employees at their work email addresses regarding a proposal for Kaiser to contribute millions of dollars in support to the Children's Initiative. David Silver responded at 10:18 p.m. from his work email address, "Looking forward to this." On February 13, 2018, Silver sent an email to Schaaf and Mungia, from his personal email address, to their personal email addresses, regarding the Children's Initiative. The email was sent at 9:00 a.m., presumably during regular City work hours. On March 1, 2018 at 2:30 p.m. (i.e., during regular City work hours), Silver used his personal email address to send an email to Schaaf asking her to talk to Sabrina Landreth, the City Administrator, about reducing the total City costs of the Children's Initiative. On March 16, 2018, Schaaf sent an email from the same email address she used for all regular City business (her Gmail account) to Ace Smith and SCN Strategies and Ruth Bernstein at EMC research regarding the title and summary of the Children's Initiative for placement on the ballot. The email was sent to City employees at private email addresses, even though the matter was clearly related to City business. On May 3, 2018 at 3:36 p.m. (i.e., during regular City work hours) Schaaf sent an email from her Gmail address to Katie Kincaid inviting her to a fundraising party at a home in Piedmont. On May 9, 2018, Schaaf sent an email from her Gmail address indicating that that she would find a time to meet with Katie Kincaid at EMC. On September 14, 2018, Schaaf sent an email blast at 5:23 p.m. inviting people to a campaign kickoff for Measure AA. The email was sent from the same email address she used for other regular City business and announced that she and Assemblyman Rob Bonta had "launched Measure AA." On October 9, 2018 at 2:00 p.m. (i.e., during regular City work hours) Schaaf sent an email inviting her mailing list (from her regular Gmail account) to a Measure AA Canvassing Kick Off.

IV. Schaaf Used Her Position As Mayor To Extract Quid Pro Quo Concessions from Measure AA Opponents

On the morning of October 31, 2018, one of the leaders of the Measure AA opposition received a telephone call from Mayor Libby Schaaf. Mayor Schaaf introduced herself using her title as Mayor of Oakland, and it was clear to the AA opposition leader that she was calling in her capacity as Mayor. The purpose of her call was to persuade him and his organization to pull the TV ads against Measure AA. He asked her why he would agree to do this. She responded that if he agreed to pull the ads, that she would grant him and his organization an audience with her, as mayor, once a month, and would hear their concerns and positions on various City issues of interest to them. In addition, she told him that she would allow his organization to have representation on a committee that would have a say in how Measure AA funds would be spent. It was clear to him from the content and tone of the conversation that she was offering him a "quid pro quo," in her capacity as Mayor, if he agreed to do what she wanted.

The Measure AA opponent let her know that he did not feel particularly inclined to pull the ads. She then escalated the pressure on me by telling me that unless he agreed to pull the ads, "things would get ugly." At the end of the phone call, he was non-committal about pulling the ads.

At approximately 7:15 p.m. the same day, the Measure AA opponent received a call at his home from a David Silver, who told him he was calling on behalf of the Mayor's office. Mr. Silver said he was calling to follow up on the call he had received earlier that day from Mayor Schaaf, and to ask if he would agree to pull the ads. The opponent said that he was not prepared to make a decision at that time. At approximately 8:58 p.m., Mr. Silver called him back, to follow up on whether he would agree to pull the ads. The opponent told him that he would not.

During the processing of my PEC complaint, I provided Kellie Johnson with this information. I later provided a copy of the opponent's signed declaration and copies of the phone bills verifying that the calls had occurred to Russell Simon. Despite clear evidence of malfeasance by Schaaf, Mr. Simon and the PEC never conducted any investigation into these allegations. Indeed, they never even contacted the Measure AA opponent for an interview!

V. Argument

Contrary to the assertions in the proposed settlement, there was ample evidence of City resources being used to promote Measure AA. This included not just email servers and City time, but also the Mayor and Silver using their positions to try to bully Measure AA's main opponents to pull television ads, using threats and promises to get what they wanted.

OMC Section 3.12.270 addresses potential penalties for violations. It provides in relevant part: "Any person who violates any provision of this Act shall be liable in a civil action for an amount up to five thousand dollars ($5,000.00) per violation, or up to three (3) times the amount the person failed to report properly or unlawfully contributed expended, gave or received, whichever is greater."

The proposed settlement reads: "Failure to Disclose Controlling Candidate Relationship on Campaign Forms" and the "amount at issue" is blank. However, according to facts outlined in the proposed settlement, the Oakland Fund collected a total $616,425 when Schaaf was in charge of the "candidate controlled fund." Therefore, three times the amount that was unlawfully contributed/received would be $1,849,275. This should be considered the maximum fine allowable. While this is understandably excessive, and not at all what I am advocating for, the recommended Stipulation/Settlement Agreement utterly fails to explain how a $9500 fine bears any relationship to the actual gravity of the multiple offenses.

In addition, the fine fails to take into consideration multiple aggravating factors, which include, but are not limited to the following: (1) Schaaf's failure to disclose over 450 documents to the plaintiffs in our lawsuit, without any legal justification, leading to the City and Schaaf's loss of the lawsuit and likely the loss of well over $100,000 in attorneys' fees to defend, not to mention years of litigation and the time of Oakland's own City Attorney's office, all at taxpayer expense (2) Schaaf's failure to cooperate with PEC staff during my attempt to mediate over the failure to provide responsive documents; (3) Schaaf's intentional efforts to hide responsive records by using exclusively a Gmail address to conduct all business, both personal and City; (4) Schaaf's

efforts to disguise Measure AA as a "citizens' initiative" when in fact it was actually a City sponsored measure, leading taxpayers and courts to improperly believe that it was a "citizens' initiative," and resulting in a cost of $30 million a year to taxpayers, when in fact the measure should never have passed at all; (5) Schaaf taking advantage of the naivete and lack of sophistication of the people put on phony committees supposedly in charge of Measure AA, when in fact she was the one driving the measure as well as fundraising related to the measure; and (6) Schaaf using her position as Mayor to extract quid pro quo concessions from a leader of the Measure AA opposition.

Given all these aggravating factors, the aggravating factors already mentioned in the PEC report, as well as the amount of money at issue, I urge the Commission to consider a fine in the amount of at least $50,000, which would be much more in line with the gravity of the offenses. Please feel free to contact me if you have any questions.

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Very truly yours,

Marleen L. Sacks

MARLEEN L. SACKS, SBN: 161388
LAW OFFICE OF MARLEEN L. SACKS
[redacted]
Telephone: [redacted]

Attorney for Plaintiffs/Petitioners

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

MARLEEN L. SACKS and ALAMEDA COUNTY TAXPAYERS' ASSOCIATION, Petitioners/Plaintiffs, v. CITY OF OAKLAND, OAKLAND POLICE COMMISSION, JOHN ALDEN, ED REISKIN, LIBBY SCHAAF, AND DOES 1-5. Respondents/Defendants	Case No.: RG 20078708 Assigned for all purposes to: Hon. Stephen Kaus Dept. 19 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FIRST AMENDED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF** Hearing Date: October 20, 2023 Time: 10:00 a.m. Location: Dept. 19 Judge: Hon. Stephen Kaus Date Action Filed: October 19, 2020

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INTRODUCTION AND SUMMARY OF ARGUMENTS

This lawsuit includes allegations against the City of Oakland, its former mayor and city administrator, and the Police Commission, for multiple, repeated and chronic violations of the Public Records Act ("PRA"), for failing to comply with its own mediation requirements for PRA disputes, for illegally awarding two separate contracts in clear violation of the City's own competitive bidding requirements, and for awarding contracts that were wasteful and a gift of public funds. Petitioners are taxpayers and a taxpayer advocacy group who are seeking to improve transparency and accountability in Oakland by forcing the City to comply with constitutional obligations to provide timely and required access to public records, to comply with its own bidding obligations to ensure that citizens get the best value for their taxpayer money, and to compel the City to seek restitution for the illegally awarded contracts.

With respect to the PRA violations, there are three categories of requests at issue: (1) PRA requests related to Measure AA, a 2018 parcel tax; (2) PRA requests related to concerns about illegal contracting by the Police Commission; and (3) miscellaneous PRA requests submitted after this litigation was initiated. The evidence clearly demonstrates that with respect to the Measure AA requests, the City did a shoddy job searching for and collecting responsive documents, and failed to search for or produce any text messages, even though responsive texts clearly existed at the time. The City also deliberately withheld responsive documents by claiming they were sent or received by employees in their "personal capacity," and therefore were not "public records." However, the City was and is still unable to articulate any legally supported criteria for determining this distinction, and the relevant officials were unaware of and unable to articulate any such criteria.

With respect to the PRA requests related to illegal contracting, the City failed to provide most responsive documents for 14 months, even after this lawsuit was filed. The only "defenses" offered by the City for these delays are understaffing, miscommunication and negligence. With respect to the requests submitted after this litigation was filed, PMK deponents were completely unable to offer any explanation whatsoever as to why, for example, it took nearly two years to provide a handful of documents, and in another, it took a year to respond that no responsive documents existed.

With respect to the illegal contracting allegations, the Oakland Municipal Code ("OMC") requires that for professional service contracts under $50,000, informal solicitation of three bids is

required, unless this requirement is waived by the City Administrator, or the City Council, based on a finding that such a waiver is in the "best interests" of the City. At the time this litigation was filed, the OMC made clear that for contracts awarded by the Police Commission, waiver by the City Administrator was not allowed. In clear violation of these provisions, the Police Commission awarded two professional service contracts without the required informal bidding. In addition, the Police Commission awarded a third professional service contract to look into the possibility of reopening an investigation into allegations of police misconduct that were over 15 years old, even though the Commission had no jurisdiction to do so, and was pointless and wasteful. Rather than concede the overt illegality of the contracts after this lawsuit was filed, the City later actually changed the language of the statute at issue and had the City Council try to retroactively waive the bidding requirements by providing the Council with misleading and dishonest information, such as omitting the fact that Raheem had repeatedly breached the contract. The Council's actions were of no effect, since the contracts were already void as a matter of law and had been fully performed on over a year earlier.

STATEMENT OF FACTS

1. Facts Related to City's Failure to Respond to Sacks' Measure AA PRA Requests

In the spring of 2018, then Oakland Mayor Libby Schaaf actively advocated for the City Council to place a $198.00 parcel tax measure on the ballot referred to as the "Children's Initiative." In April, 2018, the Council declined to do so. However, Schaaf continued to advocate for the tax, which ultimately was placed on the ballot for November, 2018, with Schaaf listed as the main author. (Sacks Decl. ¶ 226, Exh. 165 – Responses to Special Interrogatories, Set 2, p. 3:12-13:2.) Despite the fact that the measure was ultimately not sponsored by the City, the funds collected through the tax would go to the City, and documents related to the measure clearly would have constituted public records. (Sacks Decl. ¶201-202, Exhibits 156-157.) The parcel tax, known eventually as Measure AA, initially did not pass, receiving less than the 2/3 required vote. Nevertheless, in December, 2018, the City Council certified that the measure had passed, claiming that even though the ballot materials clearly specified that a 2/3 majority was required to pass, the measure had gotten over 50%, which was enough. (Sacks Decl. ¶¶107-108.)

Sacks learned of the Council's actions and was active in criticizing and publicizing the City's illegal actions. She also wanted to review public records that she believed would show that Measure AA was not a "citizen led" initiative, and that in fact, the people behind it were Libby Schaaf and other government officials and employees. She therefore submitted four separate public records requests for documents related to Measure AA, including Request No. 18-4386 (submitted December 12, 2018); Request No. 18-4466 (submitted December 17, 2018); Request No. 18-4523 (submitted December 18, 2018); and Request No. 19-96 (submitted January 6, 2019.) (Sacks Decl. ¶ 108-113, Exh. 72- 75.) The requests demanded, among other things, all communications between, to or from outside individuals and entities and Oakland officials and employees related to Measure AA. Documents were released by the City in batches between the end of January and May, 2019. (*Id.)*

The City admits that in response to Sacks' PRA requests, nobody conducted a review of all written correspondence, including emails and text messages sent by or received by Mayor Schaaf related to Measure AA/Children's Initiative. (Sacks Decl. ¶ 226, Exh. 164 - Special Interrogatory Responses Set One p. 24:15-24.) The justification for not doing so was that many of those documents would not have constituted "public records." (*Id.*, 25:6-27.) On January 14, 2019, Joanne Karchmer, Deputy Chief of Staff to Libby Schaaf, sent an email to the Mayor's office staff regarding a requested search for documents related to Sacks' CPRA request dated December 17, 2019. The email demonstrates that Ms. Karchmer did not ask Schaaf directly to search for responsive documents herself, and provided no direction on how to search for documents (e.g., searching cell phones for text messages, searching private email addresses etc.) (Sacks Decl. ¶221, Exh. 160.)

After reviewing the documents that were produced, Sacks believed that there were multiple categories of documents that likely existed, but which had not been provided. She therefore wrote to Ms. Karchmer regarding the categories of documents that appeared to be missing, in March, 2019. (Sacks Decl. ¶ 115, Exh. 76.)

One of the documents produced by the City in response to Sacks' PRA request made reference to a poll that had been conducted regarding the likelihood of the Children's Initiative passing. The document was a memo that included the following verbiage: "In our recent poll, 71% of likely voters said they would vote yes to a parcel tax of $198 (75% if those 'leaning yes' are also included.) While precise

estimates are not available due to smaller sample sizes, support for the $198 parcel tax is even higher among these impacted community members: support is at 75% among likely voters of color and 79% among renters in the Oakland flats." (Sacks Decl. ¶125, Exhibit 84.) While the document referenced a poll, the actual poll, and additional documents related to the poll, were not produced.

In a March 29, 2019 email, Ms. Karchmer wrote: "All records of the Mayor's correspondence sent or received in her official capacity re Measure AA have been provided." (Sacks Decl. ¶115, Exh. 76.) Sacks responded that she believed that there were multiple pieces of correspondence to and from the Mayor and her office that had not been provided (including the poll). Based on this response, Sacks believed that Schaaf's office was trying to shield the vast majority of responsive documents by arguing that she was acting in her "private capacity" when advocating for the measure, both before and after the election. (*Id.*)

In response to Sacks' PRA requests, the City did provide some responsive documents. Some of those documents indicated that City staff (including David Silver and Kyra Mungia, who occupied an office in City Hall but was technically not a City employee) were using City email addresses to openly engage in Measure AA campaigning activities, in violation of state law. For example, on October 7, 2018 (i.e., a month before the election), Mr. Silver used his City email address to email a person encouraging her to sign up to volunteer for the "Yes on Measure AA" campaign. (Sacks Decl. ¶224, Exh. 162, MS 001619.) Sometimes, Mr. Silver and Ms. Mungia would respond, "Thank you for your email. However, this email account cannot be used for those purposes." Sometimes they would not. (*Id.*, MS 1616-1618.) After reviewing these documents, Sacks believed there were likely numerous records that the City was obligated to produce, but was not producing.

2. Facts Related to Request for Mediation

Pursuant to Oakland Municipal Code section 2.20.270(c), any person whose request to inspect or copy public records has been denied "may demand immediate mediation of his or her request with the Executive Director of the Public Ethics Commission….Mediation shall commence no later than ten days after the request for mediation is made, unless the mediator determined the deadline to be impracticable. The local body…or department shall designate a representative to participate in the mediation." (Sacks Decl. ¶118, Exh. 78.) On January 23, 2019, Sacks submitted a formal complaint to the Oakland Public

Ethics Commission regarding the City's violations of the Public Records Act due to the City's failure to produce records in a timely manner. (*Id.*, ¶117, Exh. 77.) On April 1, 2019 Sacks sent an email to Kellie Johnson of the Public Ethics Commission ("PEC") requesting mediation of the dispute regarding the documents that the Mayor's office had still not provided. (*Id.*, ¶119, Exh. 79.) As of May 6, 2019, no mediation had been scheduled. Sacks therefore provided the Public Ethics Commission with a copy of the ordinance requiring that mediation be scheduled within 10 days. (*Id.*, ¶ 120, Exh. 80.) Ms. Johnson, representative for the PEC, responded to Sacks that they were finding it difficult to schedule the mediation and would coordinate with her to confirm the final date. (*Id.*, ¶121, Exh. 81.)

Still, no mediation was ever scheduled. Sacks spoke to PEC staff, who advised her that they were going back and forth with the Mayor's office, and there seemed to be resistance with respect to their willingness to mediate or provide additional documents. Ultimately, the mediation was never held. On June 6, 2019, Sacks emailed again to follow up on the status of the mediation and asked for additional information. She heard nothing back. She finally spoke to Ms. Johnson on June 11, 2019. Ms. Johnson told Sacks that the Mayor's office was not cooperating in communicating with her regarding the mediation and obtaining additional documents. (*Id.*, ¶¶ 121-122, 203, Exhibit 158.) Sacks therefore told Ms. Johnson that she wanted to abandon the mediation process and move forward with a hearing before the Public Ethics Commission. (*Id.*, ¶123, Exhibit 83.) In a memo memorializing her closing out the mediation efforts, Ms. Johnson wrote, "Staff has made multiple efforts, including obtaining a copy of the poll from the pollster company, to determine if the Mayor's office has/had responsive documents to no avail." (Sacks Decl. ¶202, Exh. 158.) The memo also outlined the efforts Ms. Johnson had made to communicate with the Mayor's office and Ms. Karchmer, noting that the Mayor's office was not responsive, and that the mediation was being dropped "due to the Mayor's seemingly deliberate failure to timely respond and or produce complete responsive documents to the records request." (*Id.* ¶¶ 203-204.) Neither a mediation nor a full hearing before the Public Ethics Commission ever occurred. (*Id.*, ¶ 123.)

3. Facts Related To City Refusing To Produce Measure AA Poll and Other Responsive Documents Covered by PRA Requests

During the process where the PEC was acting as an intermediary between Sacks and the Mayor's office and attempting to get a mediation scheduled, Sacks was contacted by PEC staff regarding the poll

documentation. (Sacks Decl. ¶125, Exh. 84.) Other documents that had been provided to Sacks in response to her CPRA requests confirmed that City employees knew about and/or were involved in the polling and other advocacy efforts related to Measure AA. For example, on February 9, 2018, an email was sent to two City employees in the Mayor's office, at City email addresses, stating, "initial polling shows incredible support for this initiative." (Sacks Decl. ¶ 126, Exh. 85.) Another email from David Silver (who worked in the Mayor's office) from the same week (February 14, 2018) indicated he was deeply involved in advocating for the legislation during this same time period. (*Id.*, ¶127, Exh. 86.)

PEC staff then contacted the company that actually conducted the poll and obtained a copy. (*Id.*, ¶128, Exh. 87.) Given that the goal was to have the City sponsor the legislation, and receive the bulk of the funds, it was not believable to Sacks that City staff did not have copies of the actual poll, and it was disingenuous to shield production of the documents by claiming that they were sent or received in employees' "personal capacities." Sacks therefore believed that there were likely hundreds of responsive public records that the City was failing to provide by hiding behind a false "private capacity" distinction. (*Id.*)

After filing this writ petition, Sacks propounded discovery to obtain the documents related to Measure AA that were not produced in response to her CPRA requests. In virtually all of the emails to and from Mayor Libby Schaaf, she used a non-City email address, i.e., [redacted]. The emails demonstrate that Schaaf and her "Director of Education" David Silver were working on promoting the Children's Initiative beginning in mid-2017, during regular City work hours, and using other City resources, up to and likely after the election. City employees such as Silver were alternating between City email addresses and personal email addresses seemingly at random. Some were sent during regular City business hours; some were not. Most were from before the Council rejected sponsoring the legislation in April, 2018, but not all. (Sacks Decl. ¶¶210, 219-220.)

After reviewing the Measure AA-related documents in response to discovery, Sacks believed that there were many documents that she had never seen before, and which had therefore been improperly withheld when she originally propounded her PRA requests. In order to confirm this, she did "control F" to conduct spot-check searches of the PDF versions of the documents produced in response to her PRA request (NextRequest 18-4466) for specific terms found in some of the documents listed above.

(Sacks Decl. ¶222.) She confirmed that none of the documents contained in Exhibits 159 and 160 to the Sacks Declaration were ever produced in response to her PRA request related to Measure AA, even though all of those documents would have been responsive. Therefore, had Sacks not litigated the dispute, the City never would have turned over documents that should have been disclosed in response to her CPRA requests.

Even though the City did provide a large volume of documents in response to discovery, there were still multiple documents responsive to Sacks' discovery requests that the City still has not provided. (See Sacks Decl. ¶ 229, Exh. 167 - City's Response to Document Production, Set One, p. 21:14-23:17; *Id.*, ¶ 230, Exh. 168 - Libby Schaaf's Response to Document Production, p. 4:6-9:13.) In addition, Ms. Warren has verbally told Sacks that there are several hundred documents that the City still has not turned over because it is the City's position that doing so would violate privacy interests. Ms. Warren indicated that most of the documents were emails related to fundraising for Measure AA (Sacks Decl. ¶ 247.)

4. Facts Related to Police Commission Illegal Contract with Raheem

Oakland created its own civilian Police Commission in 2018, pursuant to Measure LL. (Sacks Decl. ¶ 50, Exh. 37.) In 2019, the City Council approved Ordinance 13547, which allowed the Police Commission to enter into contracts for services. (Sacks Decl. ¶ 48, Exh. 35; ¶ 248, Exhibit 185.) The Oakland Police Department had in effect a "Use of Force" policy outlining situations where officers are permitted to use force, and the level of force permitted under the circumstances, e.g., access to weapons, size of the suspect, drugs involved, the level of the threat, whether the threat is immediate etc. (*Id.*, ¶ 51, Exh. 38.) In 2019, Assembly Bill 392 modified sections 196 and 835a of the Penal Code, relating to deadly force. Under the new law, lethal force by a peace officer was only justifiable "when necessary in defense of human life." On September 21, 2020, the Police Commission considered modifying its Use of Force policy in accordance with those changes. (*Id.*, ¶ 52, Exh. 39.)

Brandon Anderson was the founder of an organization called Raheem. According to Anderson's

LinkedIn page, he was a "black queer abolitionist"[1] whose life partner was killed by police in Oklahoma. The purpose of Raheem, according to its website at the time, appeared to be to collect stories of police abuse, file complaints of police abuse, and connect those complaining with advocacy and legal assistance. (*Id.*, ¶ 7, Exhibit 2 and ¶ 244, Exhibit 182.) On September 5, 2019, Anderson contacted the Executive Director of Oakland's Community Police Review Agency ("CPRA"), John Alden, advising that he and his organization would be filing complaints against Oakland, and asked for a meeting to better understand the complaint process. (*Id.*, ¶ 136, Exhibit 93, MS00834-836.) Alden agreed to have coffee with him (*Id.*, MS00837-838) and after the meeting, Anderson emailed him to let him know that he would be sending him a "proposal for community outreach." (*Id.*, MS00838). Anderson then contacted individual members of the Police Commission to try to meet with them individually as well, to pitch his services. (*Id.*, MS00839-860.) One of the Commissioners, Tara Anderson (presumably no relation) emailed other Commissioners about the idea of hiring Raheem to solicit community feedback in revisions to the police department's use of force policy. (*Id.*, MS00861.)

Oakland Municipal Code Section 2.04.051 provides that for professional services contracts under $50,000, no formal "request for proposals" or "RFP" is required.[2] However, the City must obtain three informal bids. While waiver of the informal solicitation process from the City Administrator is an option in limited circumstances, OMC Section 2.04.051 specifically provided at the time that waiver was not an option for Police Commission contracts. (Sacks Decl. ¶ 17, Exh. 10; ¶23, Exh. 15.)

On October 10, 2019, Raheem was invited by Alden and Ms. Anderson to give a "proposal to gather community feedback to inform" the Police Department's use of force policy. (*Id.*, ¶ 137, Exh. 94; ¶10, Exh. 3.) Without having formulated any need for this type of community feedback, Anderson was, in essence, invited to give a commercial pitch for his services. Notably, Anderson had absolutely no experience doing the sort of work contemplated. Indeed, Raheem had never performed any commercial

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[1] The term "abolitionist" in this context refers to someone who wants to abolish police, not slavery.
[2] All references to the Oakland Municipal Code will be to how it was worded at the time this lawsuit was filed, unless otherwise noted. Some of the language of the relevant statutes was modified in response to this litigation.

services whatsoever. (Sacks Decl. ¶ 173, Exh. 128; see also *Id.*, ¶226, Exh. 164 - Responses to Special Interrogatories, Set One, p. 2:17-3:9.) During his presentation, he talked mainly about himself, the circumstances of his partner being killed by police, and how his organization collects complaints of police abuse and his opinions on the gravity of police abuse. His presentation included nothing about OPD's existing use of force policy, whether, why or how it should be changed, or how his services could, in any meaningful way, inform realistic or advisable changes in a use of force policy. He proposed a cost of $40,000.[3] (Sacks Decl, ¶11, Exh. 4, MS000036-40.) Alden told the Commission that he had met with Anderson twice already and that he thought the idea was "brilliant." He strongly pushed the Commission to approve a contract. *Id.*, MS 000041-42. The resolution was brought back to the Commission on October 24 (*Id*., ¶ 12-13, Exhibit 5-6) and the final resolution approving the contract with Raheem was approved by the Commission on November 14, 2019. (Sacks Decl. ¶ 17, Exh. 10.) The Commission approved Alden to enter into a contract with Raheem, with no informal bidding whatsoever, even though OMC Section 2.04.051 specifically required informal solicitation of at least three bids for professional services under $50,000. (Sacks Decl. ¶ 17, Exh. 10; ¶23, Exh. 15.)

The actual resolution approved by the Commission specifically required obtaining a waiver of informal solicitation of bids by the City Administrator. (Sacks Decl. ¶17, Exh. 10, MS 000099.) This was contrary to the Oakland Municipal Code requirements that existed at the time, which did not permit waiver by the City Administrator of competitive bidding/informal solicitation requirements for Police Commission contracts (Sacks Decl. ¶23, Exh. 15.) Even were a waiver permitted, the City Administrator has multiple requirements that must be met in order to justify a waiver (e.g., demonstrating that waiver is in the "best interests of the City," requirements for a "market analysis," and documented efforts to solicit three informal bids) (Sacks Decl. ¶¶ 175-176, Exh. 131-132.)

Despite the fact that the Resolution called for Alden to obtain a waiver from bidding from the City Administrator, Alden never did, in fact, seek such a waiver. (Sacks Decl. ¶ 231, Exh. 170 -Alden Depo.

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[3] When asked during his deposition how this number was arrived at, Alden responded, "You'd have to ask Brandon. That was the number he picked." (Alden Depo. 67:14-25.)

71:2-74:19).[4] Initially, Alden's office did plan to submit the paperwork for requesting a waiver. (Sacks Decl. ¶ 139-140, Exh. 96 and 97). However, based on advice from the City Attorney's office, it was determined that no waiver was necessary. (Sacks Dec. ¶141, Exh. 98.) Alden justified his failure to solicit three bids based on the fact that he simply didn't know anybody else who did this type of work. (*Id.*, 60:21-61:11; Sacks Decl. ¶ 225 Exh. 163 - Response to Form Interrogatories p. 7:9-13; *Id.* ¶ 226, Exh. 164 - Responses to Special Interrogatories, p. 3:11-4:8.)

5. Facts Related to Police Commission's Failure To Respond to Sacks' PRA Requests Related to Raheem

On August 27, 2020, Sacks emailed Alden with a formal request for records pursuant to the PRA, including documents referring, relating or constituting correspondence between Commission and City employees and representatives of Raheem, and documents related to how Raheem got its contract. (Sacks Decl. ¶ 27, Exh. 18.) On August 28, 2020, CPRA Analyst Juanito Rus sent Sacks an email acknowledging her public records request, included boilerplate verbiage that the request demanded "a voluminous amount of separate and distinct records" and that staff would be providing documents on a "rolling basis." No actual estimated date for providing responsive records was provided, as required by then Government Code Section 6253. (*Id.*, ¶ 32, Exhibit 23; Sacks Decl. ¶228, Exh. 166 - RFA Responses p. 9:2-10.)[5] On September 10, 2020, Sacks sent a follow-up email to Mr. Alden and Mr. Rus regarding her PRA request and noted that the law requires the agency to provide the "estimated date and time when the records will be made available." She noted that the City had not provided her with an estimated date of production and asked when she might receive the documents. Again, she received no response. (*Id.*, ¶, Exhibit 29.)

Sacks sent multiple emails to various City officials regarding her ongoing concerns, but to no avail. (Sacks Decl. ¶36, Exh. 27, ¶39, Exh. 28, ¶ 38, ¶ 39, Exh. 28, ¶ 40, Exh. 29; ¶ 41, Exh. 31.) On

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[4] All references to this exhibit are hereinafter referred to as "Alden Depo."

[5] The City has articulated no defense for its failure to comply with the 10-day response rule. (Sacks Decl. ¶226, Exh. 164 – Special Interrogatory Responses Set One– 21:16-22:3.)

September 16, 2020, Sacks sent one last email to the City Attorney's office outlining her concerns, and her intention to litigate if the matter could not be addressed otherwise. The City Attorney's office indicated that the City would be providing documents "on a rolling basis" but did not otherwise address her concerns or provide a date of production. (*Id.*, ¶44, Exh. 33.)

The City uses a portal called "NextRequest" to track public records requests. Each request is assigned a number. Request No. 20-6523, related to the Raheem documents, shows in the portal that Sacks received one document (the Raheem contract) on September 23, 2020 (nearly a month after the initial request), and that the due date for production of the remaining documents was set for December 1, 2020. (Sacks Decl. ¶ 82, Exh. 60.) After Sacks filed her writ petition, the due date was later changed to January 1, 2021. As of that date, she still had not received responsive documents, but the due date was not changed, and Sacks was not provided a new anticipated date of production, despite the fact that she had already sued the City based on PRA violations. (Sacks Decl. ¶ 83.)

On March 24, 2021, Sacks received some responsive documents, all of which were agenda meetings and minutes which were readily available on the City's own website. The due date for the remainder of the documents was set for June 30, 2021. (Sacks Decl. ¶ 84.) Additional documents were provided between April 1 and May 17, 2021. (*Id.*, ¶ 85.) As of February 7, 2022, according to the NextRequest Portal, the request for documents still showed as "open," meaning that she was still owed responsive documents. (Sacks Decl. ¶¶ 82; 86, Exh. 60.) Eventually, Sacks did a document request through discovery and was able to thoroughly review all of the emails related to Raheem. Notably, there were many emails that were responsive to her PRA request that were not produced to her through the NextRequest portal. Had she not conducted formal discovery, she would never have received those documents. (Sacks Decl. ¶ 87.) Ultimately, it took approximately 21 months, and a lot of active follow-up, litigation and discovery, to receive all responsive documents. (*Id.*, ¶ 88.) The City's defense for failure to promptly provide responsive documents was that, "Due to staffing transfers out of the department, the CPRA did not have a staff member to complete the outstanding production…." (Sacks Decl. ¶226, Exh. 164 - Responses to Special Interrogatories Set One 23:17-24.)

6. Facts Related to Raheem's Incompetent Performance and Breach of Contract

Oakland's 2014 "Use of Force" policy, which Raheem was supposed to help revise, outlines

situations in detail where officers are permitted to use force, and the level of force permitted under the circumstances, e.g., access to weapons, size of the suspect, drugs involved, the level of the threat, whether the threat is immediate etc. (Sacks Dec. ¶ 51, Exh. 38.) In January, 2020, the Commission voted to revise the use of force policy to comply with AB 392, modifying sections 196 and 835a of the Penal Code, relating to deadly force. (Sacks Decl. ¶ 52, Exhibit 39.)

The contract with Raheem called for a "three month study" for the purpose of putting forward "evidence-based policy recommendations for the Use of Force policy…." (*Id.*, ¶ 54, Exh. 40, MS 000276-278.) The contract called for Raheem to "develop an online survey" which included questions "regarding the definition of force, the role of first responders, police rules of engagement, and police accountability and transparency." The survey called for providing of statements and/or interviews with respondents who had, among other things, either called the police, or had been stopped by police within three years. The contract called for Raheem to provide the Commission with two written updates regarding the progress of the study and a final report detailing the research findings and survey analysis. (*Id*.) The contract called for Raheem to provide a "Use of Force Study Report" documenting the research findings and analysis, including a description of how the survey was developed, its format, the results or findings of the survey, and recommendations for the Police Department's Use of Force policy that included and centered perspectives and experiences of people harmed or at greater risk of being harmed by police. (*Id.*) The contract indicated that the time of performance would begin during the week of May 18, 2020 and be completed by the week of September 21, 2020. (*Id*. MS 000279-282.) Raheem did not complete the tasks pursuant to the timeline outlined in the contract. (Sacks Decl. ¶271, Exh. 171 – Alden Depo 70:6-13; Sacks Decl. ¶¶ 142-143, Exh. 99-100.)

The online survey did not actually "go live" until approximately August 22, 2020. (Sacks Decl. ¶ 145, Exh. 102; Alden Depo. 119:4-10.) The survey closed on September 1, 2020. (*Id.*, ¶ 146, Exh. 103; ¶172, Exh. 127.) Therefore, the survey was actually available for people to participate for only a few days. Anderson was slow in providing an interim report to the Commission. (*Id.*, ¶146, Exhibit 104.) Commission members sent and received multiple emails expressing concerns about Anderson's performance, including opining that he was poor at sharing information with the "Ad Hoc Committee" in charge of the project, displayed a lack of follow-through, and did not respond to their requests in a

timely fashion. (*Id.*, ¶¶ 148-149, Exhibit 105 and 106.)

In September, 2020, a concern arose that Anderson wanted to publish details about police misconduct complaints that the City legally had to keep confidential under the Penal Code (*Id.*, ¶ 149, Exh 107.) Anderson responded to the City's concerns by stating that he intended to publish his report without honoring the confidentiality requirements. (*Id.*, ¶ 151, Exh. 108.) Commissioner Henry Gage sent Anderson and email that he was their contractor acting as an agent of the Commission, and any attempt by Raheem to publish the information would subject them to potential liability. Eventually, Commission staff attempted to have Anderson sign an amended contract to ensure he did not reveal confidential information (*Id*., ¶ 155, Exh. 113.) However, Anderson refused to sign the addendum. (*Id.*, ¶¶ 168, 170, Exh. 123, 125; Alden Depo. 21:21-23:1; 103:24-104:25.)

Once the online survey went live, Sacks attempted to complete it. Upon trying to complete the survey, Sacks was struck by the fact that very few of the survey questions had anything to do with a police department's use of force policy. Rather, they seemed to be pushing an "abolish the police" agenda. (Sacks Decl. ¶ 4, Exh. 1; Exh. 41, Exh. 127.) When Sacks attempted to submit the completed survey, the program would not let her, and she was unable to submit the survey at all. (Sacks Decl. ¶ 5.)

Ultimately, she tried completing the survey once on her smart phone, and at least three additional times on a home computer. Each time, she had the same result, and she was unable to complete the survey. (Sacks Decl. ¶ 6.) Other people experienced computer glitches as well. (*Id.*, ¶152, Exh. 109.) Sacks emailed Raheem and Mr. Alden directly regarding the problems she was having filling out the survey. (*Id.*, ¶ 31, Exh. 22; ¶ 33, Exh. 24.) She received no response. On September 1, 2020, Sacks sent a follow-up email regarding her ongoing concerns and the fact that she had received no response. She cited concerns about potential illegality and threatened to file a public ethics complaint. She still received no response. Mr. Alden forwarded her concerns to Mr. Anderson and asked Mr. Anderson to follow up with her, but he never did. (Sacks Decl. ¶ 35, Exh. 26.)

Raheem's final report regarding community feedback and the survey results was expected by September 28, 2020. (Sacks Decl. ¶ 153, Exh. 110.) The process of finalizing the report and presenting it to the Commission did not go smoothly, and as of October 1, 2020, the report still had not been finalized. (*Id.*, ¶ 156, Exh. 113.) In a September 28-30, 2020 email exchange between Rania

Adwan, Anderson and some Commissioners regarding proposed edits to the final report, Anderson commented, "I fully admit, I'm not that clued up on how research works…I'm just confused as to where and how the actually [sic] survey responses from the community come in…." (*Id.*, ¶ 155, Exhibit 112.)

On approximately October 7, 2020, Anderson announced a press conference regarding issuance of the final report. (*Id.*, ¶ 157, Exhibit 114.) On that date, Sacks received an email from Anderson, apparently sent out as part of a mass mailing to everybody who had completed (or tried to complete) the survey, using participants' confidentially submitted email addresses to publicize the press conference. (*Id.*, ¶ 57, Exhibit 43.) The email from Anderson stated in part, "During the press conference, Raheem will announce the findings from our Use of Force Study and urge the Police Commission to adopt ten policy recommendations to keep Oakland safe from the police. Will you help us pack out Oscar Grant Plaza on Thursday at 12 p.m.? If you can't make it, share the invite below with a few friends….The following Black & Brown-led community organizations will be in attendance….." It was clear to Sacks that Raheem had used identifying information it got by virtue of its contract with the Commission, and was using its position as a contractor with the City, to openly advocate for an anti-police platform. Notably, the contract with Raheem specifically prohibits it from using information that it obtains by virtue of its contractor status for such purposes. (*Id.*, ¶54, Exhibit 40, MS000277.) In addition, the contract prohibits the contractor from engaging in political activity or propaganda. (*Id.*, Exh. 40, MS 000266-267.)

At around that time, Sacks reviewed social media posts from Raheem's Twitter and Facebook pages, which also provided evidence that Raheem had an agenda of abolishing and weakening the police department. For example, shortly before the October 12 press conference, Raheem tweeted, "RSVP to rally virtually for Raheem's #Ending PoliceTerror kicking off on October 12th …." A tweet from approximately October 1 reads: "We have zero interest in policing. We are working diligently to provide technology that exists only to end police terror….At Raheem we understand that divesting from the institution of police can be hard to imagine but we also know a simple history…." Raheem tweeted the alleged findings of its survey results to advocate for policy changes it wanted. A September 20, 2020 Raheem tweet reads: "Abolishing police is the ONLY answer. Tell us your story: Raheem.org#end policebrutality #endpolice terror." A Facebook post from October 5 reads: "Any use

of police is a use of force. Raheem is holding a press conference to urge the City of Oakland to make 10 policy changes that keep Oakland safe from police." (Sacks Decl. ¶58, Exh. 44.)

This in turn spurred a flurry of emails between Commissioners and Commission staff regarding the fact that Anderson sent the press release to email addresses of individuals he had obtained by virtue of the fact that they filled out the survey, that Anderson would use the press conference to embarrass the Commission, the fact that he had no permission for the press conference, that it seemed he would use the opportunity to try to pressure the Commission into adopting his recommendations, that he seemed not to understand his role as a government contractor, that he didn't understand that he wasn't supposed to do things like this, that they were "shocked" and found it "disrespectful" what he had done, that it might constitute a breach of his contract, and related concerns. (*Id.*, ¶ 157, Exh. 114.) The City has since admitted that Raheem's email was not appropriate. (Sacks Decl. ¶ 226, Exh. 164 - Responses to Special Interrogatories Set One 13:19-14:1; 14:7-17.)

On October 8, 2020, Commissioner Regina Jackson emailed other Commissioners suggesting that Anderson not be permitted to make a presentation to the Commission, noting, "He has been given enough spotlight and does not seem to have appreciated the accountability that the spotlight requires. How dare he hold a press conference that the ad hoc has not sanctioned and that no commissioners were aware or [sic] or invited to." Another commissioner, Ginale Harris, responded, "I spoke to him a bit ago and I told him it's not a good look." (*Id.*, ¶ 158, Exhibit 115.) Ms. Adwan wrote, "I do not recommend allowing Brandon…the floor this evening without some sense of [his] position." (*Id.*, ¶. 160, Exhibit 117.)

Anderson also created a petition to urge City leaders to adopt his recommendations, which included disarming most police, supporting state legislation making all allegations of police misconduct public, cutting the police budget and building affordable housing, making individual officers pay the financial costs of their misconduct, laying off officers with records of misconduct first, and other items completely unrelated to the actual use of force policy that Raheem was contracted to obtain citizen input on. (*Id.*, ¶ 161, Exhibit 118.)

The Police Commission met on October 8, 2020 to discuss, among other things, adoption of the Use of Force policy. (Sacks Decl. ¶ 162.) During the meeting, the Police Commission agreed to allow

Brandon Anderson only four minutes to speak, but he was not allowed to go through his full PowerPoint. It appeared that the Commission was concerned he had gone rogue and shouldn't be given a soapbox to advocate for his position. Anderson used his four minute to go through his 10 policy recommendations (*Id.*, ¶ 56, Exh. 42, ¶ 162-163), which were consistent with his stated goal of weakening and abolishing police. There were several public speakers who called in, and all but one criticized the fact that his findings were pretty much ignored and not incorporated into the use of force policy. Several commented that the City had basically wasted the $40,000 it spent on his contract and were just pretending to take community input into account. During Commissioner Harris' comments, she blasted Anderson for his press conference and his efforts to release information that the City had paid for prior to presenting it to the Commission. Commissioner Harbin-Forte also blasted Mr. Anderson for his press conference and said she thought it was unprecedented and outrageous, and asked for an explanation. (*Id.*, ¶ 162-163.)

A proposed Use of Force policy was presented to the Commission and adopted on October 8, 2020. The Commission did not make any changes to the proposed policy after hearing Mr. Anderson's presentation. (*Id.*, ¶ 164, Exhibit 119). A comparison of the draft Use of Force policy from prior to the presentation of Anderson's report, and the policy that was ultimately adopted reveals that none of the changes that were made appear to be related in any way to the survey questions posed by Raheem or Raheem's recommended policy recommendations. (Sacks Decl. ¶174, Exh. 129 and 130; Alden Depo. 18:11-25.) Following the meeting, Ms. Adwan sent an email to some of the Commissioners stating in part, "I hope you're all sufficiently recovered from last night. Congratulations and well done on ploughing through an unfortunately hairy evening." (*Id.*, ¶ 165, Exhibit 120.)

Ms. Adwan then documented numerous performance issues with Anderson, including the fact that his submissions were "always late or right on the minute of deadline making it difficult for commissioners to review and ask for edits in a timely manner"; "deliverables were always sub-par, submissions often had typos, missed clarifying information, at times missed whole sections (the last report stopped at recommendation 6 out of 10)"; "Didn't take feedback and critiques to the work well, made it difficult to talk to you…."; "Wasn't ready or prepared ahead of meetings and needed a lot of hand holding…."; "Lack of clarity and honesty in [his] communications, gave conflicting information

and wasn't forthright…."; "Actions were self-promoting – insisting deliverables were posted on the Raheem website and medium…."; "Eroded trust with [his] client by continuing self-promotion and holding a press conference…."; "Created confusion and the perception that [he] was not working with us by holding a press conference…."; "Continue creating a potentially negative perception that the Ad Hoc did not receive and review your recommendations by initiating and disseminating a petition to pressure the commission and the mayor's office"; "Bc [he] insisted on going forward with conference and didn't try and convene the ad hoc commissioners, we didn't know what [he] was going to say and suddenly couldn't trust [you] to present at the meeting." (*Id.*, ¶ 166, Exhibit 121.) Ms. Adwan also noted that Anderson's "ego is unpleasant," that he had told her to adjust her tone in speaking to him, that he felt she "infantilized" him, and that dealing with him "fills me with dread a little." (*Id.*, ¶ 154, Exhibit 111.) She later wrote, "I'm not sure I've dealt with anyone so unprofessional" and noted that he never signed the contract addendum regarding maintaining confidentiality of complaints. (*Id.*, ¶ 167, Exhibit 122.)

As of October 30, 2020, Anderson still had not provided Mr. Alden with a copy of the final report. (*Id.*, ¶ 170, Exhibit 125; Alden Depo. 103:24-104:25).

7. Facts Related to Rania Adwan Illegal Contract

On July 23, 2020, the Police Commission entered into yet another illegal contract, this time with Rania Adwan, to provide additional "professional services" related to use of force policy "design, project management and outreach." (Sacks Decl. ¶ 61, Exh. 48.) It was Alden who came up with the idea of contracting with Adwan, noting that she had already provided him with some assistance "gratis." *(Id.*, ¶ 62, Exh. 49; ¶ 177, Exh. 134; Alden Depo. 35:10-15.) He convinced the Commission to again, give a contract to somebody without any evidence that OMC Section 2.04.051 had been satisfied. (*Id.*) When asked how the amount of the contract was arrived at, Alden testified that he could not recall, but that the amount ultimately agreed to was $37,000. (Alden Depo. 148:23-149:24.)

The contract itself (*Id.*, ¶ 63, Exhibit 50) confirms that the Commission failed to solicit bids from three local, qualified bidders. The "City Administrator's Contract Authority Checklist" specifically has a line item to verify this requirement was met. The box "no" is checked. The checklist provides: "If "No" explain why?" Rather than provide an explanation, the person filling out the form simply noted that the "selection of this contractor, Rania Adwan, was made by the Oakland Police Commission on

July 23, 2020 through resolution 20-03 (attached). The Resolution states: "Rania Adwan is uniquely qualified to provide the services in said contract so as to justify not implementing an RFQ/P process…." (*Id.*)

The City has admitted that it did not comply with the RFP/RFQ requirements with respect to the contracts awarded to Raheem and Rania Adwan. (Sacks Decl. ¶225, Exh. 163- Amended Form Interrogatory Responses p. 30:5-8.) According to the City, there was no informal solicitation of three bids, as required by the OMC, because Ms. Adwan's services were "unique," she had relevant experience, and Mr. Alden and Commissioner Tara Anderson didn't know of anybody else available. (*Id*., - Amended Form Interrogatory Responses p. 15:12-19.)

8. Facts Related to Knox & Ross Illegal Contract

On or about June 1, 2020, City Auditor Courtney Ruby issued a scathing audit report on the Police Commission. The audit was mandated by the City Charter. In her audit, she found that the Commission had failed to comply with numerous requirements outlined by Measure LL, regularly violated the Brown Act, had violated contracting procedures on multiple occasions, and regularly acted outside its legal authority, among many other cited instances of rude, illegal and unethical behavior. (*Id*., ¶ 59, Exhibit 45) On July 9, 2020, Ruby made a formal presentation regarding the audit findings to the Commission. (*Id*., ¶. 60, Exhibit 46.)

One of the criticisms outlined by Ruby in her audit was the Commission's decision to contract with the Knox & Ross law firm to re-investigate allegations of race and religious discrimination (the "Bey" case). The allegations related to facts going back to 2004 and had already been investigated multiple times by multiple different entities. The allegations at issue were that a murder and attempted murder case were not investigated with the diligence that complainants/plaintiffs Saleem and John Bey felt the cases deserved. The Beys believed that the lack of diligence was due to race (black) and religion (Muslim). (*Id.*, ¶ 66, Exhibit 51.) The Beys had already been litigating these same claims in federal court since 2014. The case was finally thrown out on a summary judgment motion in July 2019, i.e., several months prior to the Police Commission approving the Knox & Ross contract. (*Id.*, ¶ 68, Exhibit 52.)

The summary judgment decision outlines in some detail the factual background of the Beys' claims.

In brief, the Beys were previously associated with the infamous "Your Black Muslim Bakery" in Oakland. Another bakery affiliate, Waajid Bey, was murdered in in 2004, and in 2005, John Bey was shot. Both crimes were unsolved. The Beys filed internal affairs complaints in 2007 alleging that the cases had not been properly investigated due to racial and religious discrimination. The cases were closed because no specific misconduct against specific officers was alleged. The Beys filed another complaint in 2011, repeating the same allegations, and that complaint was closed in 2012. They filed yet another complaint in 2013, alleging, in substance, the same things. The officers involved in the original police investigations were no longer employed by OPD by then. However, the 2013 investigation found that there were some deficiencies (e.g., deficient policies and procedures) with the investigations, but no evidence of specific wrongdoing by specific officers. The case was closed out in 2014. (The summary judgment decision specifically references the investigation approved by the Police Commission on p. 14, and that its purpose was to perform an independent investigation into the 2007 and 2013 complaints.) The court ultimately granted summary judgment in favor of the City because the Beys could not raise any triable issue of fact that they had been treated differently based on their race or religion.

Because the officers implicated in the complaints were no longer with OPD, because Government Code Section 3304(d) provides that investigations into allegations of misconduct must be completed within one year of discovery, and because the City itself had already repeatedly argued in court (and won) that there were no facts to support the Beys' claims, the contract with Knox and Ross appeared to be an exercise in futility, according to the auditor's report.

There were other anomalies with the awarding of the Knox & Ross contract that made the entire process seem suspect. Authorizing a supplemental investigation on behalf of complainants who were unhappy with the original City investigations was unprecedented. (Alden Depo. 42:16-21.) Also, the Beys actively participated in selecting an investigator. (*Id.*, ¶ 71, Exhibit 53.) On May 29, 2019, Mr. Bey emailed several Commission members with a "job description" for the "investigator" that he wanted hired. He outlined the efforts he (Mr. Bey) made to identify three local investigators and advised that he (along with his advisors) had "picked" one, based in part on her race. Mr. Bey then gave direction to the Commission Chair to contact his personal "pick" to finalize the contract, as well as direction on how the

agenda item was to read. An email dated June 3, 2019 from Mr. Bey to three Commission members states: "We have submitted the required 3 names, and have chosen ex Judge Amy Oppenheimer law firm to do the independent investigation of our cases and the community recommended a Black female investigator on her staff…" (*Id.*, ¶ 72, Exhibit 54.)

The Beys' pick, the Oppenheimer firm, ultimately declined the contract. (Alden Depo 35:16-37:17; Sacks Decl. ¶ 225, Exh. 163 - Form Interrogatory Responses p. 20:1-11; *Id.*, ¶ 226, Exh. 164 - Special Interrogatory Responses, p. 19:25-20:22.) On October 24, 2019, the Commission passed a resolution approving a contract with Knox & Ross to "investigate if there is enough evidence to reopen the CPRA cases 07-0538, 13-1062 and 16-0147." (Sacks Decl. ¶76, Exhibit 58.) According to the Knox and Ross website as it existed in the fall of 2020, the firm specialized in tax, family law, real estate and business matters, and had no apparent expertise in the area of police misconduct, criminal law or civil rights violations of the type alleged in the "Bey" case. (*Id.*, ¶ 77, Exhibit 59.) The City essentially admitted that Knox & Ross had no demonstrated experience in this area. (Sacks Decl. ¶ 228, Exh. 166 - Response to RFAs p. 8:5-19; *Id.*, ¶ 225, Exh. 163, Form Interrogatory Responses p. 15:16-20:11; Alden Depo. 37:18-38:8.) A formal contract between Knox & Ross and the City Attorney's office was entered into in the amount of $49,999.00. (Sacks Decl. ¶ 183, Exh. 139.) The scope of services they were hired to perform was described as: "To advise the Director of the Community Police Review Agency (CPRA), after conducting an investigation, on whether there is enough evidence for the CPRA to further investigate any of the allegations of misconduct in any of the following Citizens' Police Review Board (CPRB) cases: CPRB case number 07-0538; case number 13-1062, and/or case number 16-0147." (*Id.*, MS 001277.)

After the Police Commission agreed to have this supplemental investigation conducted into the Beys' stale allegations, the Beys apparently submitted a follow-up complaint on February 25, 2020, alleging more "new evidence" that OPD engaged in a "pattern and practice" of discrimination. On June 23, 2020, Mr. Alden responded to the complaint, noting that the Commission did not have the jurisdiction to investigate it, since it involved allegations more than one year old. (Sacks Decl. ¶ 186, Exh. 142.) Oddly, however, this logic did not seem to prevent the City from throwing away $50,000 for the Knox & Ross contract.

The Knox & Ross investigation report was completed in 2021. (Alden Depo. 123:1-25.) As of the date of Mr. Alden's deposition (May 25, 2022), Mr. Alden (who had been the Director of the Citizen's Police Review Board) was not aware of any action that the Police Commission had taken as a result of the report, other than referring the matter to the new Inspector General to see if there could be any "lessons learned." (*Id.*) In essence, therefore, the City admitted that no action was ever taken as a result of the report, and the report was essentially useless.

9. Facts Related to City's Failure to Respond to Public Records Requests Related to Rania Adwan and Knox & Ross Contracts

After learning of the Rania Adwan and Knox & Ross Contracts, Sacks submitted additional PRA requests for documents related to those contracts i.e., the Knox & Ross contract, and the Rania Adwan contract. The requests were made via email on September 13, 2020 and September 22, 2020. On September 23, 2020, Sacks was advised that the City had uploaded her Rania Adwan request to the City's PRA "NextRequest" portal (Request No. 20-6524) and that responsive documents would be produced by December 1, 2020. (*Id.*, ¶ 89, Exhibit 61.) A small quantity of responsive documents related to the Adwan contract was provided on October 6 and 8, 2020. (*Id.*, ¶ 90.) No additional documents were provided by December 1, 2020, and no new estimated production date was provided. (*Id.*) By June 30, 2021, no additional documents had been provided. As of February 7, 2022, the request still showed as "open" on the NextRequest system. (*Id.* ¶90.)

Ultimately, Sacks did not receive all responsive documents to these requests except through discovery. She finally received the last batch of responsive documents on or about November 19, 2021, i.e., 14 months after she originally requested the documents. (*Id.*, ¶ 91.[6])

With respect to Request No. 20-6525 (related to Knox & Ross), the City posted agendas and minutes from Police Commission meetings on October 28, 2020. (*Id.*, ¶ 92, Exh. 62.) No additional documents were provided by the December 1 deadline, and the deadline was then extended to January 1, 2021.

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[6] The City admitted in Interrogatory responses that as of the date those responses were provided, the City still had not provided documents responsive to the Rania Adwan and Knox & Ross PRA requests. (See Sacks Decl. ¶ 22, Exh. 163- Responses to Form Interrogatories, p.4:3-6.)

That date came and went, no additional documents were provided, and no new anticipated production date was provided. Nearly four months later, on March 24, 2021, the anticipated production date in the system was changed to June 30, 2021. That deadline came and went, and no additional documents were provided, even though Sacks had served discovery in February, 2021, which would have encompassed all responsive documents. (*Id.*, ¶ 93.)

Ultimately, Sacks did not receive all responsive documents to this request except through discovery. She finally received the last batch of responsive documents on or about November 19, 2021, i.e., 14 months after she originally requested the documents. (*Id.*, ¶ 95.) According to interrogatory responses, the City's defense to taking over a year to respond to Sacks' PRA requests was that "Due to the numerous moving pieces of this litigation, and an oversight of counsel, Defendant did not order the IT searches until July 2021…." (Sacks Decl. ¶ 226, Exh. 164 - Special Interrogatory Responses p. 22:4-23:16.) The City also blamed "staffing transfers out of the department." (*Id*., p. 23:17-24:14.)

10. Facts Related to City's Attempt to Retroactively Have Contracts Approved By City Council And Change OMC Section 2.04.051

While this litigation was pending, and prior to having responded to Petitioners' discovery requests, City Attorney Selia Warren advised Sacks that she would be seeking the City Council's retroactive approval of the illegal contracts with Raheem and Adwan in July, 2021. Sacks advised that she would be on vacation during this time period and asked that the matter be postponed until after she returned, in exchange for her agreement to extend the deadline for discovery. Ms. Warren refused to postpone the Council meetings. Sacks was therefore unable to address the Council regarding her opposition to what they were attempting to do. (*Id.*, ¶ 130.)

In support of the retroactive approval, Mr. Alden prepared a memo outlining why the Council should retroactively approve the contracts. The memo made no mention of Sacks' litigation as being the primary driving force behind the requested action. Alden claimed he thought Sacks' litigation was "irrelevant" to the proposed changes, but admitted that the impetus for the changes came from the City Attorney's office. (Alden Depo 107:1-109:8.) The memo made no mention of the fact that Raheem performed its services in an incompetent and untimely manner, even though Alden was well aware of all of the problems involved, as described in detail above. (Sacks Decl. ¶ 131, Exh. 89.) Mr. Alden claimed that the multiple problems with Raheem's performance were "irrelevant" to the question at

hand, i.e., whether having the City Council retroactively approve the contract was in the City's best interests. (Alden Depo. 110:7-112:22.) He claimed that he thought Raheem's performance was "not relevant" to the "competitive process." (*Id.*) Mr. Alden prepared a similar memo recommending retroactive approval of the Rania Adwan contract, and similarly made no mention of the fact that Sacks' litigation was the driving factor behind the action. (*Id.*, ¶132, Exhibit 90.)

Even though Sacks was unable to address Council members in person, due to her vacation, she did, however, send an email dated July 12, 2021, specifically referencing her pending lawsuit over the contracts, and specifically referencing the lack of qualifications of Raheem, and the fact that it was unclear what, if any work, Adwan performed. She also noted that the contracts were long since over and done with, and that attempting to approve them retroactively was a transparent way to attempt to minimize liability, rather than for any real legitimate purpose that would serve the City's interest. (Sacks Decl. ¶133, Exh. 91.)

In addition to trying to retroactively approve the two contracts, the City simultaneously presented a proposal to alter the language of Oakland Municipal Code section 2.04.051, to eliminate the language regarding waiver by the City Administrator, reading, "the foregoing is not applicable to the Police Commission." The new proposed language eliminated other language in that section that could be read to mean that the CPRA Director was required to go through the formal RFP process for all contracts, not just those over $50,000. (Sacks Decl. ¶225, Exh. 163- Amended Form Interrogatory Response p. 30:10-32:9.) In support of this proposal, Alden submitted a memo to the City Council (clearly actually written by the City Attorney's office, not himself) supporting the changes to the statutory language. (Sacks Decl. ¶134, Exh. 92.) Notably, the Alden memo directly contracted Alden's own testimony regarding what he thought the original language meant. Specifically, Alden testified at his deposition that he thought that the phrase, "the foregoing is not applicable to the Police Commission" meant that the Police Commission itself could waive the requirement of having to obtain three informal bids. (Alden Depo. 105:1-16; 66:15-67:13; 72:21-75:3.)

The matter of the retroactive contract approval and modifying the language of the OMC was considered by the Public Safety Committee on July 13, and by the full Council on July 20. During both the Public Safety Commission and the full Council meeting, it was apparent that discussions had already

occurred behind closed doors. There was no mention or discussion during open session of Sacks' lawsuit, the concerns mentioned in her email, the qualifications of the bidders, or how approval of the contracts without any informal bidding was in the City's best interests. The council nevertheless took action to try to retroactively approve the contracts and passed the legislation to modify the statute. (Sacks Decl. ¶135.)

11. Facts Related To PRA Violations After Initial Writ Petition Filed

On February 17, 2021, Sacks submitted a public records request using the City's electronic "NextRequest" portal – Request No. 21-1445. The request was for documents related to the Police Commission's recent award of a professional services contract to a New York based firm called StoneTurn to conduct a personnel-related investigation, despite the fact that StoneTurn was not licensed in California, in violation of the Business and Professions Code. (Sacks Decl. ¶237, Exh. 175.) The original due date in the "NextRequest" system was March 1, 2021. On that date, the City changed the due date to June 1 2021, on the grounds that Sacks was allegedly requesting a "voluminous" amount of documents. (She was not.)

The June 1, 2021 deadline came and went. The City continued to ignore Sacks' request for documents for months. Sacks repeatedly corresponded with the City Attorney's office about the fact that she was not receiving documents in a prompt manner, but still, no documents were provided, and no updated or anticipated date of production was provided. Sacks finally received a small quantity of responsive documents on or about August 24, 2021. She wrote to the City Attorney's office to advise that the bulk of the documents had not been provided. She received no response. The remainder of the documents were not released until November 12, 2021, nearly nine months after the original request was made. (Sacks Decl. ¶237.)

On October 1, 2020, Sacks made a request for public records using the City's electronic NextRequest system - Request 20-6813, for all documents related to the legislative history of OMC Section 2.04. Some documents were provided on October 7, 2020. On October 28, 2020, the system reflected an updated message that additional time was needed to search for additional documents, claiming that a large quantity of documents was being requested (again, this was not true). An updated due date of December 1, 2020 was provided. That date came and went, and no additional documents

were provided, but the system was updated to reflect a new due date of January 1, 2021. On January 1, 2021, no documents were provided. The City failed to finally complete production on the request until September 28, 2022, nearly two years after the original request was made. (Sacks Decl. ¶241, Exh. 179.)

On November 18, 2021, Sacks made a request for public records using the City's "Next Request" system – Request No. 21-9777. The request was for requested documents related to whether the City had made findings sufficient to continue holding meetings remotely in compliance with AB 361. According to the system, documents were due on November 29, 2021. (Sacks Decl. ¶238, Exh. 176.)

On November 29, 2021, no documents were produced, and no extension was requested or documented. On December 1, 2021, Sacks sent a message through the system that read: "A response to this request was due on November 29, 2021. That was Monday. As you may be aware, I am currently suing the City for persistent failure to comply with the CPRA. And yet, you still can't manage to comply with the timelines. Please let me know when I will be receiving responsive documents. Thank you." Her message was ignored, and she received no documents or any sort of response. It was nearly five months before the City finally produced responsive documents. (*Id.*)

On December 2, 2021, Sacks submitted a request for public records through the City's electronic "NextRequest" system – Request No. 21-10146. The request was for all documentation related to any plans or efforts to have Measure Z (a police funding parcel tax) revised. The electronic portal indicated a due date of December 13, 2021. On September 27, 2022, nearly a year later, the City finally responded that no responsive documents exist. (Sacks Decl. ¶239, Exh. 177.)

On January 5, 2022, Petitioner submitted a request for public records through the City's electronic "NextRequest" system – Request No. 22-111. The request was for documents related to Measure KK (a City public works bond and tax measure requiring annual audits). The request was made on behalf of ACTA. The NextRequest portal reflected a due date of January 18, 2022. On January 21, 2022, the system was updated to reflect the following verbiage: "Request extended: Additional time is required to answer your public records request. We need to search for, collect, or examine a large number of records (Government Code Section 6253(c)(2))." (A large number of records was not requested). No actual date for providing the documents requested was provided, in violation of the CPRA. One document was

provided on February 15, 2022. (Sacks Decl. ¶240, Exh. 178.)

LEGAL ARGUMENT

I. The City Violated OMC Sections 2.04.010, 2.04.040, and 2.04.051 by Entering into Contracts with and Paying Vendors Rania Adwan and Raheem Without Any Informal Solicitation of Bids (First, Second, and Third Causes of Action).

Petitioners' First, Second and Third Causes of Action all allege violation of Oakland's contracting laws with respect to the contracts issued to Raheem and Rania Adwan. The Police Commission entered into these contracts without having first solicited three informal bids, as specifically required by the OMC. While Respondents have claimed that this requirement can be waived by the City Administrator, the fact of the matter is that the City never even tried to have the City Administrator waive the requirements. The only defenses that the City has articulated are, in essence, (1) that John Alden and Tara Anderson didn't know anybody else who could do the work, (2) the statute was confusing; (3) they misread the statute (4) they got bad advice from the City Attorney's office and (5) years later, after this lawsuit was filed, they retroactively tried to have bidding requirements waived by the City Council. None of these defenses are persuasive, for the reasons outlined below.

As stated in *Konica Business Machines U.S.A., Inc. v. Regents of University of California* (1988) 206 Cal. App. 3d 449: "The purpose of requiring governmental entities to open the contracts process to public bidding is to eliminate favoritism, fraud and corruption; avoid misuse of public funds; and stimulate advantageous market place competition. …Because of the potential for abuse arising from deviations from strict adherence to standards which promote these public benefits, the letting of public contracts universally receives close judicial scrutiny and contracts awarded without strict compliance with bidding requirements will be set aside. This preventative approach is applied even where it is certain there was in fact no corruption or adverse effect upon the bidding process, and the deviations would save the entity money….The importance of maintaining integrity in government and the ease with which policy goals underlying the requirement for open competitive bidding may be surreptitiously undercut, mandate strict compliance with bidding requirements. (*Id.* at 456-57; see also *Domar Elec., Inc. v. City of Los Angeles* (1994) 9 Cal. 4th 161, 175-76 (stating that "bidding requirements must be

strictly adhered to in order to avoid the potential for abuse in the competitive bidding process.")

As stated by another court, the "importance of maintaining integrity in government and the ease with which policy goals underlying the requirement for open competitive bidding may be surreptitiously undercut, mandate strict compliance with bidding requirements." (*Ghilotti Constr. Co. v. City of Richmond* (1996) 45 Cal. App. 4th 897, 907-08.) Given these policies underlying the competitive bidding laws, the California Constitution and case law prohibit any payment on a contract made in violation of those laws. (Cal. Const. art. XI, § 10; *Miller v. McKinnon* (1942) 20 Cal. 2d 83.)

A. Applicable Provisions of Oakland Municipal Code.

OMC Section 2.04.010 provides a definition of "informal bidding" as applied to professional services, as follows: "Informal bidding, solicitation or proposals/qualifications" means the competitive processes (advertising and bidding or solicitation) required by the City Administrator in a City administrative instruction for the purchase of supplies, services or combination up to and including fifty thousand dollars ($50,000), or for the purchase of professional services up to and including fifty thousand dollars ($50,000). Solicitation of three (3) quotes or responses (required from local-certified business, first) shall be the minimum number of businesses solicited." (Sacks Decl. ¶ 18, Exh. 11.)

Section 2.04.022 gave the Police Commission the authority to enter into contracts, including contracts for professional services, beginning in July, 2019. Section 2.04.022 provides very specific guidance to the Police Commission regarding the form, approval and monitoring of the contracting process. (Sacks Decl. ¶21, Exh. 13.) For example, the statute provides that direction can be given to the contractor only by motion by affirmative vote of four or more members. It also provides that individual commissions or less than a quorum are not allowed to provide direction to a contractor.[7] It provides that contractors who perform work beyond the work scope of the contract are not entitled to payment for

[7] Notably, the City repeatedly violated this provision by having the "ad hoc" committee provide direction to Raheem, not the full Commission.

such work. It also provides that all resolutions approving contracts must be posted in a link to or on the City's website. Subsection F provided at the time: "All contracts approved by the Commission are subject to the competitive and other processes and procedures required under Sections 2.04.050 and 2.04.051 as well as the personnel findings, purchasing programs and requirements set forth or referenced in the remainder of this chapter, unless City Administrator or City Council waiver by resolution is obtained as necessary for each of the programs/policies."

OMC Section 2.040.040 applies to all contract approval processes, not just the Police Commission. It provides in subsection B(3) that for professional services contracts involving expenditures of $50,000 or less, "informal advertising and solicitation of proposals/qualifications is required." (Sacks Decl. ¶22, Exh. 14.) Subsection B(4) requires a formal RFP/RFQ process for professional services contracts over $50,000. Section 2.04.060 (Lowest Responsible Bidder) outlines the criteria that should be considered in determining the lowest responsible bidder, including the ability, capacity and skill of the bidder, the ability of the bidder to provide the services promptly, and the character, integrity, reputation, judgment and experience of the bidder. (Sacks Decl. ¶ 24, Exh. 16.)

OMC section 2.04.150 provides: "It is unlawful for any officer or employee to purchase or contract for supplies or services for the City other than as hereinafter prescribed, excepting purchases made from petty cash, emergency purchase or other purchases conforming to control procedures established by the City Administrator. Any purchase, contracts or obligations to pay made contrary to the provisions of this article shall be null and void." (Sacks Decl. ¶25, Exh. 17.)

OMC Section 2.04.051 (Competitive process and qualification-based awards for professional services contracts) was originally adopted in 2004. It applies to all contracts for professional services, not just those issued by the Police Commission. It was modified in 2019 to provide in relevant part[8], in Subsection A(2): "Police Commission Responsibility. The CPRA Director shall conduct a request for

[8] References to the statute shall be to the original language prior to the City modifying the language in 2021, unless otherwise stated.

proposal ("RFP") or request for qualifications ("RFQ") process for all contracts to be awarded by the Police Commission. The RFP/Q process shall be conducted in accordance with Section 2.04.040 B.4., above." The language therefore implied that the RFP/RFQ process applied to all contracts, not just those over $50,000, although this lawsuit was not premised on this argument.

OMC Section 2.04.051 (Sacks Decl. ¶23, Exh. 15) also allows for waiver of the informal bidding process for professional service contracts, but the clear language of the ordinance specifically exempts the Police Commission from being able to have this requirement waived. Specifically, subsection B provides: "Waiver—City Administrator Authority, City Council Authority. Upon a finding by the City Administrator that it is in the best interests of the City, the City Administrator may waive said RFP/Q requirements for professional services contracts up to fifty thousand dollars ($50,000.00). The foregoing is not applicable to the Police Commission. Upon a finding by the City Council or its designee that it is in the best interests of the City, the City Council may waive said RFP/Q requirements for contracts in any amount."

B. The Police Commission Failed to Solicit Three Informal Bids for the Raheem and Adwan Contracts; Therefore, the Contracts Are Void.

It is undisputed that the Police Commission did not solicit three informal bids for either the Raheem or the Adwan contracts. Alden's defenses for failing to do so are unpersuasive. He essentially testified that he didn't know anybody else who could do the work, and believed the services were "unique." With respect to Raheem, much of the work performed was simply composing "SurveyMonkey" type questions for an on-line survey and posting the survey. It is hard to argue that coming up with questions related to a police Use of Force policy for an online community input survey required a lot of expertise. Similarly, identifying more marginalized members of the community and asking them the same questions in a different format, and asking some additional questions about their experiences with police, also would not require a lot of specialized expertise. The policy recommendations developed by Raheem were not likely shaped by the responses obtained, but were more likely influenced by Anderson's own political ideology and agenda. With respect Adwan contract, she had already been volunteering in the office for a few weeks, and it was simply more convenient to hire her than go

through the exercise of the informal solicitation process.

The manner in which Raheem and Adwan were hired is precisely why bidding, RFQ/RFP and informal solicitation requirements exist. "Competitive offers or bids have no other object but to insure economy and exclude favoritism and corruption in the furnishing of labor, services, property and materials for the uses of the city. (*Los Angeles Dredging Co. v. City of Long Beach* (1930) 210 Cal. 348, 354.) They exist to prevent vendors from trying to cozy up to public officials to sell their services, by volunteering their services for free, or by taking them out to lunch and schmoozing them. They exist to prevent City officials from just giving contracts out because they are too lazy or busy to try to find the best person to do the job for the least amount of money. Here, there wasn't even a stated need for the services at issue. Rather, both Anderson and Adwan put themselves in a position where it was easy to convince City officials that the work should be done, and they were the obvious and only choices to do it. It is not surprising that the project to gather community input turned out to be such a disaster. Anderson had no relevant experience prior to pitching his services, he had an overt political agenda, and Alden didn't even bother to check his references. (Alden Depo. 61:12-63:10.)

But the fact that the end result turned out to be such a disaster isn't even relevant to the issue of determining that the statute was violated. The bottom line is that the language is clear – the solicitation of three bids was required. Waiver was not option, because of the clear language of the OMC saying that waiver did not apply to the Police Commission. Because Alden and the Police Commission failed to solicit three informal bids, the contracts were illegal and therefore void.

C. The Police Commission Failed to Comply with the Waiver Process Even If It Applied.

The Resolution approving the Raheem contract clearly required Alden to follow the process for obtaining a waiver from the City Administrator. Alden's staff then began the process of seeking the waiver. However, in approximately January, 2021, the City Attorney's office advised that a waiver was not required, and the process was abandoned. The Resolution regarding the Adwan contract makes no mention of obtaining a waiver, and there was no effort to obtain a waiver at all. The training materials that were given to the Police Commissioners prior to them entering into the contract imply that it was

possible to approve a contract without going through the informal solicitation process, but that they would still need to go through the waiver process in that case. Here, not only did they not go through the informal solicitation process, but they did not bother to seek a waiver either. The City has offered no excuse or explanation for why it proceeded in this manner. While the newly revised Section 2.04.051 has deleted the language reading, "the foregoing is not applicable to the Police Commission," supposedly in line with the "original intent" of the statute (see argument below), the City's actions still make no sense. If the intent was to allow the Police Commission to enter into contracts in the same manner as other City departments and have the ability to avail themselves of the waiver option, then at a minimum, the Police Commission would have skipped the informal solicitation process, but still gone to the City Administrator for a waiver. But that's not what happened. With no informal solicitation, and no waiver either, the contracts were doubly illegal and doubly void.

D. The City's Interpretation of OMC Section 2.04.051 Does Not Justify the Police Commission Awarding Contracts With No Informal Solicitation of Bids and No City Administrator Waiver.

One of the City's main defenses is that the relevant language of Section 2.04.051 (which says the waiver process doesn't apply) is contradicted by language in Section 2.04.022(F), which references the fact that the Police Commission can avail itself of the waiver process. (Sacks Decl. ¶225, Exh. 163 – First Amended Responses to Form Interrogatories, 8:7-14; 29:26-32:9.) The City admits that the language of the two different sections made the waiver issue "ambiguous," justifying the decision to change the language in July of 2021, well after this litigation was initiated. (*Id.*)

The problem with this argument, however, is that even if 2.04.022(F) governs, and 2.04.051 does not, the fact remains is that Alden never pursued a waiver, and both contracts were executed, performed on, and paid for without having ever sought a waiver. The City has articulated no defense whatsoever for this. When deposed about how Alden himself interpreted the language in Section 2.04.051 (since he was a lawyer), he said he thought the language meant that the entire waiver process did not apply to the Police Commission, and the Police Commission could waive the requirements on its own. (Alden Depo. 105:1-106:25; 72:21-74:19.) However, this argument was not credible, since Alden took no action to

have the Police Commission waive the requirements itself. Indeed, the Resolution for Raheem specifically references the need to get the City Administrator to waive the bidding requirements, and yet, Alden never got that done. In addition, Alden's interpretation is completely at odds with the City's own stated interpretation, as articulated in the written discovery responses, which is that Section 2.04.022(F) allowed for City Administrator waiver. It is also contradicted by his own memo (which was likely ghost written by the City Attorney's office) to the City Council requesting that the language of 2.04.051 be changed. In that memo, he claimed that it was always the intention of the statutory language to reflect a desire to allow for City Administrator waiver.

Regardless of the strengths of any of these arguments and defenses, the bottom line is that the Police Commission never sought or obtained a waiver by the City Administrator, and the contracts were therefore illegal and void.

E. The City's Argument That Section 2.04.022(F) Trumps Section 2.04.051's Prohibition on Waiver Is Unpersuasive And Contrary To Rules of Statutory Construction.

Section 2.04.051 applies generally to the bidding and waiver requirements for all City contracts. The section is not, unlike Section 2.04.022(F), limited to discussion of contracts approved by the Police Commission. The language at issue reads: "Waiver—City Administrator Authority, City Council Authority. Upon a finding by the City Administrator that it is in the best interests of the City, the City Administrator may waive said RFP/Q requirements for professional services contracts up to fifty thousand dollars ($50,000.00). The foregoing is not applicable to the Police Commission. Upon a finding by the City Council or its designee that it is in the best interests of the City, the City Council may waive said RFP/Q requirements for contracts in any amount."

In determining the intent of a statute, courts must look first to the language of the statute, giving effect to its plain meaning. (*Poliak v. Board of Psychology* (1997) 55 Cal. App. 4th 342, 348.) Where the words of the statute are clear, courts may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. If the statutory language is clear and unambiguous, there is no need for construction. *Id.*, 348. Here, the language could not be more clear. The original statute was adopted in 2004. It was modified in 2019 to add language in several places to

the OMC to give the Police Commission the authority to enter into contracts. (Sacks Decl. ¶ 248, Exh. 185.) The sentence about the "foregoing is not applicable to the Police Commission" was the only sentence added to this particular section, and its insertion into the section was obviously deliberate. The word "foregoing" means, in plain English, "just mentioned or stated; preceding." The language that was "just mentioned" in the section deals with the City Administrator's ability to waive RFP/Q requirements for professional service contracts up to $50,000. Therefore, the language clearly means that the option to have the bidding requirements waived for the City Administrator applies to all other departments and contracts in Oakland, but not to the Police Commission.

The City argues that the language in Section 2.04.022(F) creates ambiguity about whether or not the City Administrator can waive bidding requirements. However, the City's argument makes no sense for several reasons. First, this section came into being at the exact same time that revision to Section 2.04.051 was made. It reads, "All contracts approved by the Commission are subject to the competitive and other processes and procedures required under Sections 2.04.050 and 2.04.051 as well as the personnel findings, purchasing programs and requirements set forth or referenced in the remainder of this chapter, unless City Administrator or City Council waiver by resolution is obtained as necessary for each of the programs/policies." While it does imply that City Administrator waiver can apply to bidding requirements, this section is not limited to informal bidding for professional services. Therefore, it could apply to contracts for things other than professional services, and contracts for over $50,000. The relevant language in Section 2.04.051, however, only applies to contracts for professional services under $50,000 where informal bidding is an option.

The principle of *noscitur a sociis* requires courts to interpret words or phrases in light of the other words around them. Statutory language is to be understood in context, with the whole of a statute considered when attempting to construe each part. (*In re Tobacco II Cases* (2009)46 Cal.4th 298, 315; *Bonnell v. Medical Board* (2003) 31 Cal.4th 1255, 1261; *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 903.) A particular provision must be construed with reference to the entire statutory scheme of which it forms a part in such a way that harmony may be achieved among the parts. (*People ex rel. Younger v. Superior Court* (1976) 16 Cal. 3d 30, 40.) No part of the legislative enactments should be

rendered surplusage if a construction is available that avoids doing so. (*Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1253; *People v. Arias* (2008) 45 Cal.4th 169, 180; *Elsner v. Uveges* (2004) 34 Cal.4th 915, 931.) "If conflicting statutes cannot be reconciled, later enactments supersede earlier ones[citation], and more specific provisions take precedence over more general ones [citation]." (*Collection Bureau of San Jose v. Rumsey* (2000) 24 Cal.4th 301, 310; *City of Petaluma v. Pac.Tel. & Tel. Co*. (1955) 44 Cal.2d 284, 288.)

Applying these canons of statutory interpretation to the language here, it remains clear that for professional services contracts under $50,000, the City Administrator did not have the authority to waive those requirements. To read the sentence in Section 2.04.051 any other way would render the entire sentence meaningless and "surplusage." Reading the 2019 revision to Section 2.04.051 in the context of the new language created by Section 2.04.022, it stands out how Section 2.04.022 contains multiple efforts to micromanage and constrain the authority of the Police Commission. As noted above, it provides limits on how the contractor can be given direction, as well as prohibiting individual commissioners from directing the contractor. It provides limits on the Commission's ability to contract for services that exceed its budget, and contains multiple other limits, restrictions and directions. It requires specific training for the Commissioners prior to their ability to vote on contracts. These restrictions evidence a concern by the drafters that the Commission could abuse or be negligent in its contracting authority, and that the purpose of the language was to prevent this abuse or negligence. It would make perfect sense that the 2019 revision to Section 2.04.051, eliminating the ability to have the City Administrator waive informal solicitation requirements, was inserted for the same purpose. In addition, the 2019 revision to Section 2.04.051 was more specific, whereas the language of 2.04.022 was more general.

F. Regardless of the Interpretation of Section 2.04.051, The Contracts Are Still Void Because The City Never Obtained Waiver by the City Administrator.

While the City has argued in discovery that 2.04.022 permits waiver by the City Administrator despite the limiting language of 2.04.051, the fact remains that the Police Commission and its staff never sought nor obtained waiver by the City Administrator at any point in time.

The work performed by Raheem was completed sometime in October, 2020. As of December 18, 2020, Raheem had only been paid $13,000. (Sacks Decl. ¶ 171, Exh. 126.) Final payment of $27,000 was made on December 31, 2020, i.e., after this writ petition had been filed and served, and after the City was well aware of the claims that the contract was void. (Sacks Decl. ¶ 188, Exh. 144.) Rania Adwan finished her work with the City at around the same time as Raheem, and she was paid on October 23 and October 30, 2020. (Sacks Decl. ¶ 189, Exh. 145.)

OMC Section 2.04.150 provides in relevant part: "It is unlawful for any officer or employee to purchase or contract for supplies or services for the City other than as hereinafter prescribed…Any purchase, contracts or obligations to pay made contrary to the provisions of this article shall be null and void." The City violated the OMC when it executed and approved a contract for professional services to vendors for under $50,000 without going through the informal solicitation process, and without obtaining a waiver. Therefore, the contracts were both void prior to the contractors ever performing any actual work. Even if an argument could be made that the defects could have been corrected thereafter, by having either the City Administrator or City Council retroactively waive the requirements prior to their being paid, neither the City nor the Police Commission did this. With respect to the Raheem contract, Raheem had still not been fully paid at the time the City was put on notice with the defects and legal arguments set forth in this lawsuit. And yet, they sought no waiver. Given that there was never any waiver prior to the performance of the work and the payment of the vendors, the contracts were clearly void.

G. The City's Efforts to Have The City Council Retroactively Waive the Informal Solicitation Requirements After This Writ Petition Was Filed Are Ineffective in Validating Already Invalid Contracts.

Under California law a municipal corporation or other public entity may incur contractual liability only in the manner prescribed by applicable statutory or charter requirements. A private party who has contracted with a public agency is entitled to the agreed consideration only if the public officials involved were authorized to enter into the agreement. Where there has been a failure to comply with a requirement of competitive bidding, the agreement, which would otherwise have been valid, is deemed

illegal and unenforceable. This has been the case ever since the California Supreme Court decision in *Zottman v. City and County of San Francisco* (1862) 20 Cal. 96. Zottman held that since the contract was invalid because of noncompliance with city charter bidding requirements, no claim could be made against the municipality despite its acceptance and retention of the benefits received from the contractor. Since specific requirements had been ignored, the agreement could not be subsequently affirmed or ratified. The Court held that to allow the municipality to confirm the illegal and void contract would in effect repeal the charter requirement of competitive bidding. The court reasoned further that to allow such ratification would enable public authorities to do retroactively what they could not do originally. (*Id.*, 103.)

More recent Supreme Court cases have continued this theme. "Ordinarily, compliance with the terms of a statute requiring the letting of certain contracts by a public agency such as a municipal corporation or county by competitive bidding and the advertising for bids is mandatory with respect to those contracts coming within the terms of the statute; a contract made without compliance with the statute is void and unenforceable as being in excess of the agency's power." (*Miller v. McKinnon* (1942) 20 Cal.2d 83, 87-88.) “This is a rule of strict construction…. Contracts wholly beyond the powers of a municipality are void. They cannot be ratified; no estoppel to deny their validity can be invoked against the municipality; and ordinarily no recovery in quasi contract can be had for work performed under them. It is also settled that the mode of contracting, as prescribed by the municipal charter, is the measure of the power to contract; and a contract made in disregard of the prescribed mode is unenforceable.' [Citations.]" (*Id.* at p. 88.)

"`Because of the potential for abuse arising from deviations from strict adherence to standards which promote these public benefits, the letting of public contracts universally receives close judicial scrutiny and contracts awarded without strict compliance with bidding requirements will be set aside. This preventative approach is applied even where it is certain there was in fact no corruption or adverse effect upon the bidding process, and the deviations would save the entity money. [Citations.] The importance of maintaining integrity in government and the ease with which policy goals underlying the requirement for open competitive bidding may be surreptitiously undercut, mandate strict compliance with bidding

requirements. [Citation.]" (*MCM Construction, Inc. v. City and County of San Francisco* (1998) 66 Cal.App.4th 359, 369.) The bidding statutes are for the protection of property holders and taxpayers, not for the benefit or enrichment of bidders on public works projects. (*Id.* at p. 370, fn 5.)

These cases demonstrate public entities and bidders must strictly comply with the competitive bidding statutes and that the failure of the public agency to follow those requirements renders any subsequent awarded contract void. A void municipal contract cannot be ratified where there is a prescribed formality that has irrevocably been disregarded. "Such contracts cannot be ratified for a two-fold reason: Ratification must be based upon a previously existing power to make the particular contract; and ratification must be made in the manner prescribed for the making of such contract. Where a municipality has no original power to enter into a particular type of contract, it lacks power to ratify it after performance. And where the contract is one which, though within the powers of the municipality, requires the formality of advertising for bids, and such contract is let without compliance with the requirement, it is not subject to ratification because the mode of entering into it has irrevocably been disregarded. There is no longer any possibility of compliance with the requirement of competitive bidding. Hence it is impossible to ratify the contract in the manner prescribed for the making of the contract, and the attempted ratification is of no effect. The courts have usually given the fullest effect to these salutary rules limiting the ratification of municipal contracts, for the purpose of protecting municipalities from a disregard of important charter provisions." (*Los Angeles Dredging Co. v. City of Long Beach* (1930) 210 Cal. 348, 359.)

A voidable contract may be ratified. A void contract cannot be. A contract, "not being binding in any event, but being utterly void from the beginning, could not be validated by ratification. There must be some act which is the equivalent of the execution of a new contract, or something which operates as an estoppel." (*Hanley v. Murphy* (1924) 70 Cal. App. 157, 166-167.)

The City Council's attempt to retroactively "waive" the informal solicitation process long after this writ petition was filed, and long after the contracts had been performed and paid for, is in essence an attempt to ratify a void contract. According to the plain language of OMC Section 2.04.150, the contracts were void at the point that the City failed to comply with the OMC provisions requiring

informal solicitation, and if not then, certainly at the point where the City failed to seek a waiver from the City Administrator and had the contracts approved anyway. They could not be revived after that.

H. The Information Provided to the City Council Regarding Retroactive Waiver Was False, Misleading and Fraudulent; Waiver Was Not in The City's "Best Interests."

According to OMC Section 2.04.051(B), the City Council itself "may waive said RFP/Q requirements for contracts in any amount" upon a "finding by the City Council or its designee that it is in the best interests of the City." In support of making a finding that the waiver was in the City's "best interests," the proposed resolution stated that Section 2.04.051(B) was "ambiguous" as to the authority of the City Administrator or the Police Commission to waive informal solicitation, and claimed that the Council "intended" for 2.04.022(F) to preserve the City Administrator's ability to waive the informal solicitation process. The resolution also stated that "due to its unique qualifications…it was in the City's best interests for the Police Commission to retain Raheem, without first engaging in the RFP/Q process…." (Sacks Decl. ¶ 131, Exh. 89.) The language was essentially the same for the Rania Adwan contract. (*Id.*, Exh. 90.)

In the memo from Alden supporting the resolution, the only benefits to the City that were stated included that it "improves enforceability of the impacted Police Commission contract" and "Council demonstrates support of the Police Commission and its goals and efforts." The memo went on to state, "In the alternative, the Council could choose to take no action, but the potential ambiguity in the language of OMC section 2.04.051(B) leaves this contract vulnerable to challenge. A waiver by Council thus avoids this issue altogether, which is preferable to the status quo." (*Id.*)

The memo fails to discuss why enforceability of a contracts completed long ago is even an issue, or why enforcing the contracts would benefit with the City. If the contracts were void, then the City would have been entitled to its money back, which would have been a preferable result. Notably, the memo makes no mention of the myriad problems encountered with the Raheem contract, and the fact that Raheem repeatedly breached the contract, e.g., (1) the fact that the $40,000 amount for the contract was unsupported and apparently chosen by Raheem with no examination or questioning by Alden or the Commission; (2) the fact that Anderson was late in completing the project, and therefore breached

material terms of the contract; (3) Anderson's repeated delays in getting information to the ad hoc committee and delivery of the final report; (4) Anderson's using confidential private email addresses to advertise a press conference to manipulate and pressure the Police Commission into adopting his policy recommendations; (5) Anderson's staging of a press conference for the same purpose; (6) the fact that Anderson was not permitted to deliver a full presentation of his report to the Police Commission because he had gone rogue and they had lost trust in him; (7) the fact that multiple Commission members were upset over Anderson's tactics used with respect to the press conference; (8) the fact that none of the information provided by Anderson was timely enough to actually be incorporated into the Use of Force policy, and was essentially useless; (9) the fact that Anderson lacked experience of qualifications to do the work requested; (10) the fact that Rania Adwan complained about how difficult it was to work with Anderson; and (11) the fact that Anderson was at risk of revealing confidential information in violation of the Penal Code and then refused to sign an addendum to the contract to ensure that he did not. All of these things are facts which clearly would relate to whether or not it was in the City's "best interests" to retroactively try to approve an already void contract, or not waive applicable requirements, confirm the contract was void, and try to get its money back. And yet, there is no mention of any of them.

The most glaring omission in the memo, however, is the fact that it makes no mention of the instant lawsuit. When asked why he included no reference to it, Alden replied, "Why would I?" (Alden Depo. 107:1-108:19.) He offered no real explanation for why it wasn't included, and said, as if to excuse the omission, that the impetus for the memo came from the City Attorney's office, that it was never his idea, and that he would not "speculate" as to their motivations. (*Id.*, 108:20-109:8.) Alden claimed he did not include any of the problems with the Raheem performance in the memo because "it was not relevant to the question at hand." (*Id.*, pp. 110:7-112:22.) This was obviously not true, since the "question at hand" was whether or not waiver of the competitive process, and ratification of a void contract, was in the City's best interests.

City Administrator Ed Reiskin admitted during his deposition that the factors that go into determining whether waiver of informal solicitation would be appropriate include factors such as the contractor's past experience, having excellent references, a good price for the service being purchased,

and a lack of other qualified people. (Reiskin Depo. 20:21-22:10.) When asked what grounds existed for the City Council to justify finding a waiver was in the City's best interests with respect to the contested contracts, Reiskin stated, "I don't recall." (*Id.*, 23:8-25.) Reiskin claimed he was unaware of the issues with how Raheem had performed on the contract, and admitted that he did not know whether the Council considered any of the problems that were outlined in this litigation. (*Id.*, 24:1-26.) He admitted that in general, factors such as a contractor's adherence to confidentiality provisions, quality of performance on the contract, competency, timeliness etc. would all be relevant in determining the "best interests of the City." (*Id.*, 26:23-27:8.) There is no evidence that the City considered any of the actual relevant factors that should go into a determination of "best interests." Rather, the only justification for the Council's action was to defeat the legal argument made in this lawsuit that the contract was already void.

The elements of fraud and deceit consist of "(1) misrepresentation of a material fact (consisting of false representation, concealment or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to deceive and induce reliance; (4) justifiable reliance on the misrepresentation; and (5) resulting damage." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc*. (1998) 68 Cal. App. 4th 445, 481-82.) As applied here, the Alden memo misrepresented materials facts, e.g., all of the problems with the Raheem contract, and the motivation for bringing the matter to the Council. He, and arguably the City Attorney's office as well, were aware of the intentional omissions, and intended to deceive the Council into accepting the information provided to convince them to try to retroactively approve the contracts. The council did in fact rely on the information and attempt to retroactively approve the contracts. Alden (or whoever actually wrote the memos) in essence engaged in overt fraud to get this done, and this Court should not endorse such a tactic.

The fact that the contractor had done a sub-par job was clearly relevant to the issue of the City's best interests, as was this lawsuit. The failure to include these factors meant that any finding and subsequent resolution passed by the City was misinformed, meaningless, or evidence of collusion by members of the Council with Alden (or whoever actually wrote the memos) to approve the contract. The fact that Sacks sent an email in advance of the Council meeting advising them of her concerns with

the contracts and reminding them of her lawsuit, and the fact that the Council simply rubber-stamped the waivers and resolutions in the meeting with no discussion, makes it clear that the real motivation was a defense to this lawsuit and the arguments that are now being made. Those reasons were not disclosed in the memo or resolution, and the entire exercise was deceptive and farcical.

I. Because The Contracts Are Void, The City Must Be Compelled to Seek Restitution (Fifth Cause of Action)

When a contract is void, the city is entitled to restitution from the party who had purportedly contracted with the city. This is true even if the individual believed the city officer with whom he was contracting had the authority to bind the city. "Persons dealing with a public agency are presumed to know the law with respect to any agency's authority to contract….One who deals with the public officer stands presumptively charged with a full knowledge of that officer's powers, and is bound at his . . . peril to ascertain the extent of his . . . powers to bind the government for which he ... is an officer, and any act of an officer to be valid must find express authority in the law or be necessarily incidental to a power expressly granted." (*Katsura v. City of San Buenaventura* (2007) 155 Cal.App.4th 104, 109.) Indeed, as a general rule, a party who mistakenly believed it was validly contracting with a city cannot even recover on a quasi-contract theory. "'[N]o implied liability to pay upon a quantum meruit could exist where the prohibition of the statute against contracting in any other manner than as prescribed is disregarded.' [Citation.] The reason is simple: ' "The law never implies an agreement against its own restrictions and prohibitions, or [expressed differently], 'the law never implies an obligation to do that which it forbids the party to agree to do.' " ' [Citation.] In other words, contracts that disregard applicable code provisions are beyond the power of the city to make. [Citation.]" (*Katsura*, *supra* at p. 110.)

As applied here, the Rania Adwan and Raheem contracts are void for the reasons stated above. Under the law, the City is entitled to seek restitution, and this is the relief that Petitioners are seeking in order to ensure that the taxpayers are not forced to pay for illegal contracts.

II. The Contract with Knox & Ross To Investigate The Stale Bey Allegations Should Be Declared Null and Void as an Illegal Gift of Public Funds In Violation of the California Constitution, Article XVI, Section 6 (Sixth Cause of Action).

Section 6 of article XVI of the California Constitution provides that the Legislature has no power 'to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation ....' The term 'gift' in the constitutional provision 'includes all appropriations of public money for which there is no authority or enforceable claim,' even if there is a moral or equitable obligation." (*Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 450.) The primary question is whether the money is to be used for a public or a private purpose. (*San Diego County Dept. of Social Services v. Superior Court* (2005) 134 Cal.App.4th 761, 766.)

Where a public expenditure benefits a private entity or individual, it may still be permitted, provided that it "promotes a valid and substantial public purpose within the authorized mission of the public agency appropriating the funds." 67 Ops.Cal.Atty.Gen. 32, 34 (1984). While the determination of what constitutes a public purpose is primarily a matter for the Legislature, the determination must have a reasonable basis. (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 746.) As applied here, there was no public purpose served with the Knox & Ross contract. The contract was given to a private law firm. It involved complaints of private individuals. Those individuals, the Beys, had already sued the City years before, for the same allegations. The City had prevailed on summary judgment. There simply was no public benefit from the contract.

In response to an interrogatory asking for all evidence that the contract was not a gift of public funds, the City alleged the following: (1) the Commission had the authority to reopen administratively closed cases under OMC Section 2.45.070(M); (2) the three previously filed complaints from 2007, 2013 and 2016 all "fundamentally related to broad allegations of systemic racial and religious discrimination" by OPD; and (3) the Commission was empowered to "[p]ropose changes at its discretion […] to any policy, procedure, custom, or General Order of the Department which governs […] profiling based on any of the protected characteristics identified by federal, state, or local law….[]." (Sacks Decl. ¶226, Exh. 164, Response to Special Interrogatory No. 25.)

These claims are not credible, particularly given that after the Police Commission authorized the

Knox & Ross investigation, the Beys submitted a follow-up complaint on February 25, 2020, alleging more "new evidence" that OPD engaged in a "pattern and practice" of discrimination. On June 23, 2020, Alden responded to the complaint, noting that the Commission did not have the jurisdiction to investigate it, since it involved allegations more than one year old.[9] (Sacks Decl. ¶ Par. 185, Exh. 142). Alden's letter is in essence an admission that the Commission did not have jurisdiction to investigation stale allegations. In addition, the Knox & Ross investigation report was completed in 2021. (Alden Depo. 123:1-25.) Since then, the Police Commission took no further action as a result of the report, meaning that the report was essentially useless.

The fact that the Commission was empowered to propose changes to department policy regarding profiling is irrelevant, since Knox & Ross were not contracted to look into those issues. Rather, their contract was limited to finding out whether there was new evidence to justify re-opening old complaints from 2007-2016. A crime victim whose grievances dated back to 2004 obviously would not have information on evidence of current racial or religious bias within the department, and the City has never claimed that the Beys had such evidence. Evidence of such bias from many years ago would hardly be relevant, and certainly not worth a $50,000 investigation.

III. Petitioners Are Entitled to Writ Relief Pursuant to C.C.P. Section 526(a) with Respect to the Knox & Ross and Raheem Contracts Because the Contracts Constituted Waste (Seventh Cause of Action).

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[9] Under the Government Code Section 3304 (d), a police officer cannot be subjected to discipline "if the investigation of the allegation is not completed within one year of the public agency's discovery by a person authorized to initiate an investigation of the allegation of an act, omission, or other misconduct." While there is an exception for "significant new evidence," in order for that exception to apply, it must be established that (a) the evidence could not reasonably have been discovered in the normal course of investigation without resorting to extraordinary measures by the agency or (b) The evidence resulted from the public safety officer's predisciplinary response or procedure." If the Beys had such evidence, it should have been disclosed in response to Interrogatory No. 25, but it was not. Moreover, given that no action was ever taken as a result of the investigation, it is apparent that the exception did not apply. It is hardly believable that the possibility that the exception might have applied should have cost taxpayers $50,000.

California Code of Civil Procedure Section 526a states: "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein…."

Under Section 526(a), waste is defined as money that is squandered, and thus is a constitutionally prohibited gift of public resources. (See *Harmon v. City and County of San Francisco* (1972) 7 Cal.3d 150, 165-169.) Waste has been described as "a useless expenditure . . . of public funds" that is incapable of achieving the ostensible goal. (*Harnett v. County of Sacramento* (1925) 195 Cal. 676, 682-683.) It also encompasses fraud, corruption, or collusion. (*Harmon v. City and County of San Francisco*, supra, 7 Cal.3d 150, 160.) Public spending may also qualify as waste if it is completely unnecessary, or "useless," or provides no public benefit." (*Sundance v. Municipal Court* (1986) 42 Cal.3d 1101, 1138-1139.)

Both the Knox & Ross and Raheem contracts were completely unnecessary and useless, and provided no public benefit. The Raheem contract was illegal from the outset. The results from the so-called "outreach" were provided too late to have any meaningful impact on the use of force policy. Knox & Ross were contracted to conduct a preliminary investigation into allegations of police misconduct that have already been repeatedly investigated and litigated, and where the acts at issue occurred well over 10 years ago. Even if some misconduct were uncovered, the officers at issue are no longer employed by OPD. Even if they were still employed, they could not be disciplined, since the statute of limitations expired long ago. Therefore, the investigation would have served no useful purpose. As it turned out, it did in fact serve no useful purpose, because the Police Commission took no action after it was completed.

IV. The Police Commission Acted Outside the Scope of Its Authority In Authorizing The Knox & Ross Contract (Eighth Cause of Action).

The powers of the Police Commission are limited by Section 604(a) of the City Charter, and related municipal code sections. Section 604(a) of the City Charter provides in relevant part: "(a) Creation and Role: (1) There hereby is established the Oakland Police Commission …which shall oversee the Oakland Police Department…in order to ensure that its policies, practices, and customs conform to national standards of constitutional policing. The Commission shall have the functions and duties enumerated in this Section, as well as those assigned to the Commission by Ordinance. The Charter also established a Community Police Review Agency, who is tasked with investigating public complaints of police misconduct, pursuant to Section 604(f). According to subsection (f)(3), investigations are to be completed within 180-250 days, except in unusual circumstances. The Agency Director then has 45 days to make findings and recommendations on discipline. Subsection (g) addresses situations where the Police Chief and the Commission disagree regarding discipline, making it clear that the purpose of investigation is to determine whether disciplinary action should be imposed." (Sacks Decl. ¶249, Exh. 186.)

OMC Section 2.04.022 (Police Commission Authority) subsection B (Scope of Contract Authority) provides: "The Police Commission's contract authority is limited to contracts for professional, technical, and/or scientific services that support the Police Commission in fulfilling its functions and duties as specified in Charter Section 604(b) and Enabling Ordinance No. 13498 C.M.S. codified at Oakland Municipal Code Chapter 2.45.

The City claims that OMC Section 2.45.070(M) gave the Commission jurisdiction to enter into the Knox & Ross contract. The City's claims are without merit. That statute provides that the Commission is permitted to review the Agency's "dismissal and/or administrative closure of all complaints of misconduct involving Class I offenses" and "direct the Agency to reopen the case and investigate the complaint." (Sacks Decl. ¶245, Exh. 183.) But that is not what occurred here. The Commission was not reviewing a complaint from a member of the public that had been investigated within 250 days, and then dismissed, nor were they ordering that the Agency reopen the case and investigate it. Rather, they contracted with a private law firm to "advise the Director of the Community Police Review Agency (CPRA) after conducting an investigation, on whether there is enough evidence

for the CPRA to further investigate any of the allegations of misconduct" in the Beys' prior complaints, which were between four and 13 years old – i.e., much older that the Commission itself. There is simply nothing in the City Charter or City ordinances that authorized the Commission to enter into the contract in the first instance. Moreover, by Alden's own admission in his June 23, 2020 to Mr. Bey, the Commission did not have the jurisdiction to investigate stale complaints. (Sacks Decl. ¶186, Exh. 142.) The statute of limitations has long since expired to discipline any officer implicated by the Beys' complaints,

The City also argues that under Section 606(b)(4) of the Charter, the Commission is empowered to propose changes to policy, procedure, and customs. However, as stated above, Knox & Ross was not retained to look into such matters, and issues related to systemic bias that may have existed 15 years ago or more would hardly be relevant. Therefore, the Commission lacked jurisdiction or authority to enter into a contract with a law firm to investigate stale complaints.

V. The City Repeatedly Violated the California Public Records Act (10th-12th Causes of Action).

The California Public Records Act (the PRA) was enacted in 1968 to: (1) safeguard the accountability of government to the public; (2) promote maximum disclosure of the conduct of governmental operations; and (3) explicitly acknowledge the principle that secrecy is antithetical to a democratic system of "government of the people, by the people and for the people." Govt. Code § 7920.000, formerly Govt. Code § 6250 et seq.[10]; *CBS, Inc. v. Block* (1986) 42 Cal. 3d 646, 651-652; *San Gabriel Tribune v. Superior Court* (1983) 143 Cal. App. 3d 762, 771-772.) The PRA expressly provides that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Govt. Code § 7921.000 (formerly Govt. Code §

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[10] In 2021, the legislature enacted the CPRA Recodification Act (AB 473). This Act, effective Jan. 1, 2023, renumbered and reorganized the PRA in a new Division 614 of the Government Code, beginning at section 7920.005. Nothing in AB 473 was "intended to substantially change the law relating to inspection of public records." (Govt. Code §7920.100.)

6250). The purpose is to give the public access to information that enables them to monitor the functioning of their government. (*CBS, Inc. v. Block, supra*, 42 al. 3d at 651; *Times Mirror Co. v. Superior Court* (1991) 53 Cal. 3d 1325, 1350; *San Gabriel Tribune v. Superior Court, supra*, 143 Cal. App. 3d at p. 772.) "Openness in government is essential to the functioning of a democracy. Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process." (*International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 328-329.)

The PRA "embodies a strong policy in favor of disclosure of public records." (*Lorig v. Medical Board of Cal*. (2000) 78 Cal.App.4th 462, 467.) In November 2004, the voters approved Proposition 59, which amended the California Constitution to include the public's right to access public records: "The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." (Cal. Const., art I, § 3, subd. (b)(1).) As amended, the California Constitution provides each statute, court rule, and other authority "shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." (Const., art I, §3, subd. (b)(2).)

The courts and the California Attorney General have determined that the constitutional provisions added by Proposition 59 maintain the established principles that disclosure obligations under the PRA must be construed broadly, and exemptions construed narrowly. (*Sierra Club v. Superior Court of Orange County* (2013) 57 Cal. 4th 157, 175-176; *Sutter's Place v. Superior Court* (2008) 16 Cal. App. 4th 1370, 1378-1381.) By approving Proposition 59, the voters have incorporated into the California Constitution the PRA policy prioritizing government transparency and accountability, as well as the PRA's careful balancing of the public's right of access to government information with protections for the public interests in privacy and effective government. As applied here, the City repeatedly and flagrantly violated Petitioners' rights under the PRA.

A. The City Failed to Provide Numerous Public Records in Response to the Measure AA PRA Requests.

With respect to the Measure AA documents, many, if not most were not provided until Petitioners sued, and obtained the requested documents via the discovery process. A review of the documents produced during discovery revealed that there were many documents that had never been provided in response to Requests Nos. 18-4386, 18-4466, 18-4523, and 19-96. In order to confirm this, Sacks did "control F" to conduct spot-check searches of the PDF versions of the documents produced in response to her request (NextRequest 18-4466) for specific terms found in some of the documents produced in discovery. She confirmed that none of the documents contained in Exhibits 159 and 160 were ever produced in response to her CPRA request related to Measure AA, even though all of those documents would have been responsive. (Sacks Decl. ¶222.) For example, Exhibit 159 contains a November 5, 2017 email from David Silver (using his City email address) to Libby Schaaf (using her gmail address that she normally used for City business), and copied Schaaf's Chief of Staff Shereda Nosakhare (at her city email address) and Michael George, the consultant used to pass the Children's Initiative. The email contains the phrase "Children's Initiative" but was not produced. (MS 001557; OAK-000290).

In addition, in its response to Special Interrogatories 35-37, the City admitted that no City agent, official, employee or representative actually conducted a review of all written correspondence, emails and/or text messages sent by and/or received by Schaaf related to Measure AA and/or the Children's Initiative. (Sacks Decl. ¶ 226 Exh. 164.) Its justification for this failure, as stated in the interrogatory response, was that the law prohibits public agencies and employees from using public resources to promote a partisan position in an election campaign, and that to the extent that the communications reflected such efforts, such records would not have constituted "public records." However, this argument would not have justified not even conducting a review of the documents to determine which needed to be produced in response to a PRA request, and which did not.

Shereda Nosakhare, Schaaf's Chief of Staff, was designated as the "person most knowledgeable" about the City's compliance with Sacks' Measure AA PRA requests. Her responses indicated that the City did a shoddy and haphazard job in attempting compliance. For example, the process for collecting responsive documents consisted simply of forwarding the request, along with an email saying, "Please search for any and all responsive documents." (Sacks Decl. ¶233, Exh. 171, Nosakhare Depo. 26:10-

24.)[11] She was not sure that this email would actually have even been sent to Schaaf. (*Id.*, 27:4-19; 28:5-18). She admitted she did not know who would have searched Schaaf's private email account to look for responsive documents, and couldn't say for sure if her assistant would have conducted such a search. (*Id.*, 29:19-31:3.) She didn't know who was responsible for searching Schaaf's private account. (*Id.*, 31:12-19.) She did not know why no texts from Schaaf were produced. (*Id.*, 32:15-17.) She did not know if she or anybody on her staff ever told Schaaf or others that they needed to search their devices for text messages. (*Id.*, 13:17-14:5.) She admitted she never asked Schaaf if she had reviewed all of her text messages and emails to ensure that all responsive documents were produced, and didn't know if anybody else in the office had done so. (*Id.*, 18:18-25.) She admitted that she was aware that there were many documents that were produced during discovery that were never produced in response to Sacks' PRA requests. When asked why they were not produced in response to PRA requests, she responded, "I don't know." (*Id.*, 23:5-17.) She did not know why the poll performed by the consulting company regarding the Children's Initiative was never produced to Sacks. (*Id.*, 40:11-22.) David Silver, when asked why he hadn't produced a March 1, 2018 email related to the Children's Initiative, admitted that it was a public record and stated, "I might have missed some." (Sacks Decl. ¶ 235, Exh. 173, Silver Depo. 31:11-33:20.) [12]

The City has also admitted that it is continuing to withhold hundreds of documents (and indeed did not even produce them in discovery) on the basis that they are not "public records," relate primarily to fundraising activities, and therefore implicate privacy concerns. (Sacks Decl. ¶ 247.)

1. The City's argument that it could legally withhold documents created in an employee or official's "personal capacity" because they are not "public records" lacks merit

The PRA defines "public records" as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (Govt. Code, § 7920.530, subd. (a), formerly Govt. Code, § 6252,

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[11] References to this deposition transcript are referred hereafter to as "Nosakhare Depo."
[12] References to this deposition transcript are referred to hereafter as "Silver Depo."

subd. (e).) The term "public records" encompasses more than simply those documents that public officials are required by law to keep as official records. A writing is defined as "any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored." (Gov. Code, § 7920.545, formerly Gov. Code, § 6252, subd. (g).)

The statute unambiguously states that "[p]ublic records" include "any writing containing information relating to the conduct of the public's business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics." (Gov. Code, § 7920.530, subd. (a), formerly Gov. Code, § 6252(e); See also *Regents of the University of California v. Superior Court* (2013) 222 Cal.App.4th 383, 399*; Braun v. City of Taft* (1984) 154 Cal.App.3d 332, 340; *San Gabriel Tribune v. Superior Court*, supra, 143 Cal.App.3d at p.774. The PRA creates "a presumptive right of access to any record created or maintained by a public agency that relates in any way to the business of the public agency." (*Sander v. State Bar of California* (2013) 58 Cal.4th 300, 323.)

In *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 617, the California Supreme Court held that a public record has four aspects: "it is (1) a writing, (2) with content related to the conduct of the people's business, which is (3) prepared by, or (4) owned, used, or retained by any state or local agency." In that case, San Jose attempted to withhold documents from private accounts, arguing that the City did not have custody and control over them. The Supreme Court, looking at the intent of the PRA, disagreed. In analyzing whether a document was related to City business as opposed to personal, the Court noted: "Whether a writing is sufficiently related to public business will not always be clear. For example, depending on the context, an email to a spouse complaining 'my coworker is an idiot' would likely not be a public record. Conversely, an email to a superior reporting the coworker's mismanagement of an agency project might well be. Resolution of the question, particularly when writings are kept in personal accounts, will often involve an examination of several factors, including the content itself; the context in, or purpose for which, it was written; the audience to whom it was directed; *and whether the writing was prepared by an employee acting or purporting to act within the*

scope of his or her employment.... We clarify, however, that to qualify as a public record under CPRA, at a minimum, a writing must relate in some substantive way to the conduct of the public's business." (*Id.* at 616-617.) (Italics added). Notably, the italicized language makes clear that whether the document was written in the employee's "personal" versus "official" capacity is only one of several criteria that must be considered in determining whether the document qualifies as a "public record." Therefore, the City clearly relied on the wrong factors in determining which documents to produce, and which to withhold, with respect to Sacks' PRA requests.

The Court in *San Jose* went on to analyze the next component of the definition of "public record" by noting that a "writing is commonly understood to have been prepared by the person who wrote it. If an agency employee prepares a writing that substantively relates to the conduct of public business, that writing would appear to satisfy the Act's definition of a public record." *Id.* at 619. The court found the City's argument that using a personal account somehow made a difference was not compelling. The Court noted: "When employees are conducting agency business, they are working for the agency and on its behalf. (See, e.g., *Cal.Assn. of Health Facilities v. Dept. of Health Services* (1997) 16 Cal.4th 284, 296-297; cf. *Competitive Enterprise Institute v. Office of Science & Technology Policy* (D.C. Cir. 2016) 827 F.3d 145, 149 [reaching the same conclusion for federal FOIA requests].)….A writing prepared by a public employee conducting agency business has been "prepared by" the agency within the meaning of section 6252, subdivision (e), even if the writing is prepared using the employee's personal account." (*Id.* at 621.)

Applying the applicable law to the facts here, it is clear that the City failed to comply with the PRA when responding to Sacks' Measure AA public records requests. Interrogatory No. 58 requested that the City outline the criteria used to determine whether documents were written in City employees' or officials' "personal" versus "official" capacity, justifying a determination that a document was not a "public record." The City responded to that interrogatory, and in response to Interrogatory No. 37 that, in essence, if it would have been illegal for the correspondence to have been sent or received using public resources, then, by definition, it could not have been a public record. Special Interrogatory No. 59 sought all documents outlining the criteria that would have been applied to drawing a distinction between documents sent or received in an employee's "official" versus "personal" capacity. (Sacks

Decl. ¶ 227, Exh. 165.) None of the documents described by the City in response to that interrogatory actually contained such criteria, and in essence, the City has relied on whether or not the document would qualify as a "public record" under the PRA.

Notably, City employees were completely unable to describe the distinction between documents sent or received in somebody's "personal" versus "official" capacity. (Sacks Decl. ¶ 236, Exh. 174, Reiskin Depo. 28:12-23.)[13] Silver admitted that he had never seen any documents describing such a distinction. (Silver Depo. 28:24-29:3.) Open Government Coordinator Mark Forte and former Chief of Staff Shereda Nosakhare were both unable to describe any criteria, documents or training that they were aware of to distinguish between documents sent or received in the person's "personal" versus "official" capacity. (Nosakhare Depo. 16:19-17:8; 17:21-25; 18:1-13; Sacks Decl. ¶ 234, Exh. 172 - Forte Depo 37:11-38:17.)[14] David Silver, claimed that any document sent or received after the City Council rejected adopting the Children's Initiative as a City sponsored measure would have been considered "personal," rather than City business. (Silver Depo. 14:12-15:2.) However, when confronted about an email that was sent from a personal email account long before the Council rejected the Children's Initiative, Silver was unable to explain this. (*Id.*, 33:21-34:14.) He also claimed that whether the document was sent or received during regular City work hours was relevant. (*Id.*, 9:8-15.) However, when confronted about the fact that he was sending Children's Initiative related documents from his personal email during regular City work hours, he was unable to explain this. He was also unable to explain why he sent an email to other City officials using their personal email addresses. (*Id*., 31:15-32:7.)

The City's argument regarding how it distinguished records based on "official" versus "personal" capacity lacks merit for numerous reasons. First, members of the public are absolutely entitled to documents that would show that the City was violating the law by using public resources to promote partisan measures and candidates. In essence, the City is arguing that if it would have been illegal for

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[13] References to this deposition transcript will be referred to hereafter as "Reiskin Depo."
[14] References to this deposition transcript will be referred to hereafter as "Forte Depo."

the email to have been sent, then it is exempt from the PRA. This is the absolute antithesis of the purpose behind the PRA.

The City has also argued that because Mayor Schaaf was using a personal email address to conduct Measure AA activities, this evidences "her intent to keep City business and non-City business appropriately separate." (Response to Special Interrogatory No 37). This argument makes no sense because Schaaf conducted virtually all of her City business using her Gmail account.[15] (See e.g., Exhibit 159.) Other emails demonstrate a lack of any clear distinction in whether employees used personal or City email addresses. For example, David Silver alternated between City email addresses and personal email addresses seemingly at random. (See e.g., Sacks Decl., ¶ 223, Exh. 159, MS 01558; OAK 000311.)

During his deposition, Silver claimed that he considered any documentation related to the Children's Initiative prior to the City Council's rejection of the initiative in April, 2018 to be a "public record," and anything thereafter, not. He claimed he would use his work email address for public records, and his personal address for personal business, and that he would not have conducted Measure AA business during City work hours. (Silver Depo. 9:8-15; 10:2-11:15; 13:12-15:2;18:6-12.) However, a review of documents produced during discovery reveals no clear distinction based on whether the emails were before or after April, 2018, whether personal or City email addresses were used, or whether the emails were sent during or after the regular work day.

For example, on July 20, 2017 at 12:11 p.m., Maggie Croushore, Libby Schaaf's Project Director, Communications and Sustainability, Oakland Promise sent an email to multiple City employees at their work email addresses regarding a proposal for Kaiser to contribute millions of dollars in support to the Children's Initiative. David Silver responded at 10:18 p.m. from his work email address, "Looking forward to this." (Sacks Decl. ¶223, Exh. 159, MS 001577-1581; OAK 00654-659.) On October 15,

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[15] When asked why Schaaf used her personal email address to conduct virtually all City business, the designated PMKs stated that they did not know. (Silver Depo. 19:15-22; Nokashare Depo.18:25-19:10; Forte Depo pp. 38:18-39:2.) Nosakhare also admitted that she did not know what Schaff did to keep her personal business separate from her official business. (Nosakhare Depo. p. 19:15-18.)

2017, David Silver sent an email from his personal email account at 10:42 a.m. (presumably during regular City work hours) entitled "How can we support Children's Initiative?" (*Id.*, MS 001576; OAK-000530.) On December 8, 2017, Schaaf sent an email to Jose Corona, Director of Equity and Strategic Partnerships, at 2:22 p.m., with copies to others, including Mr. Silver at a personal email address, outlining her opinion on when City resources could be used to promote and draft the Children's Initiative, including the hiring of a paid public policy fellow. (*Id.*, MS 001565; OAK-000428). On February 13, 2018, Silver sent an email to Schaaf and Mungia, from his personal email address, to their personal email addresses, regarding the Children's Initiative. The email was sent at 9:00 a.m., presumably during regular City work hours. (*Id.*, MS 001568; OAK-000451). On March 1, 2018 at 2:30 p.m. (i.e., during regular City work hours), Silver used his personal email address to send an email to Schaaf asking her to talk to Sabrina Landreth, the City Administrator, about reducing the total City costs of the Children's Initiative. (*Id.*, MS001573-1574; OAK-000484-485)

On March 16, 2018, Schaaf sent an email from the same email address she used for all regular City business (her gmail account) to Ace Smith and SCN Strategies and Ruth Bernstein at EMC research regarding the title and summary of the Children's Initiative for placement on the ballot. The email was sent to City employees at private email addresses, even though the matter was clearly related to City business. (*Id.*, MS001571; OAK-000480). On May 3, 2018 at 3:36 p.m. (i.e., during regular City work hours) Libby Schaaf sent an email from her Gmail address to Katie Kincaid inviting her to a fundraising party at a home in Piedmont. (*Id*., MS001588; OAK-000666.) On May 9, 2018, Libby Schaaf sent an email from her Gmail address indicating that that she would find a time to meet with Katie Kincaid at EMC. (*Id*., MS 001587; OAK-000665.) On September 14, 2018, Mayor Schaaf sent an email blast at 5:23 p.m. inviting people to a campaign kickoff for Measure AA. The email was sent from the same email address she used for other regular City business and announced that she and Assemblyman Rob Bonta had "launched Measure AA." (*Id.*, MS001575; OAK-000522.) On October 9, 2018 at 2:00 p.m. (i.e., during regular City work hours) Schaaf sent an email inviting her mailing list (from her regular gmail account) to a Measure AA Canvassing Kick Off. (*Id.*, MS001592; OAK000670.)

It is clear that regardless of whether Measure AA was a citizen-led initiative or a City sponsored one, the City would have (and indeed now does have) extensive involvement, making most documents

related to it "related to city business." For example, a March 29, 2018 presentation filed with the City Clerk regarding the proposed "Children's Initiative" (Exhibit 156) and the proposed resolution to the City regarding the measure (Exhibit 157) make clear that there would be extensive involvement by the City in the program, e.g., the City Council having to approve selection of the administering agency, and the Mayor being required to seek recommendations from the Council for Oversight Commission membership. This meant, in turn, that any documents in the possession of City employees and officers related to the Children's Initiative should also have been considered public records. The City's failure to turn over those records in response to Sacks' PRA requests was a violation of the PRA.

2. The City has continued to withhold documents related to Measure AA in violation of the PRA

The City Attorney has represented to Petitioners that it is continuing to withhold several hundred documents related to Measure AA which it claims are related largely to fundraising efforts to pass Measure AA. The documents were not even produced during discovery. (Sacks Decl. ¶ 247.) The City apparently believes that the documents either would not qualify as "public records," and/or that privacy interests justify withholding of the documents. To the extent that the documents reflect names, email addresses, or other private information related to donors, that information could easily be redacted, and does not justify withholding the documents in their entirety. Petitioners request that this Court review the documents that have been withheld, in camera, to make a determination as to whether they constitute "public records," and order them disclosed as appropriate.

3. The City failed to properly retain, search for or produce relevant text messages.

The PRA does not prescribe specific methods of searching for responsive documents. Agencies may develop their own internal policies for conducting searches. Some general principles have emerged, however. In *City of San Jose*, the court outlined the steps that should be taken, including communicating the scope of the information requested to the employees likely to have them, and have employees search their own personal files, accounts and devices, provided that the employees have been properly trained in how to distinguish between personal records and public. (*Id.* at 627-628.) The court went on to note that agencies can adopt policies that will reduce the likelihood of public records being held in personal accounts or on personal devices, e.g., requiring that employees carbon copy a public email address for

all communications touching on public business. (*Id.* at 628.)

It was clear from the testimony of the deponents responsible for responding to the Measure AA PRA requests that the City had not trained the employees in how to distinguish personal from public records. (Silver Depo. 28:13-25; 30:1-24; Reiskin Depo. 28:12-23.) The City admits that text messages are public records to the same extent as any other document, provided they relate to City business and do not qualify for an exemption. (Forte Depo. 39:22-40:1.) However, there was no training about the need to retain text messages. (Nokashare Depo. 14:14-20.) There was no specific direction on the accounts and devices to search. (*Id.*, p. 13:17-14:5.) The City has no effective policies to ensure that public records were adequately preserved or searched for. (Forte Depo. 29:22-30:23.) There is nothing in writing discouraging City employees from conducting City business on personal devices. (*Id.*, p. 30:24-31:5.) There are no training materials or other documents that specifically instruct employees to make sure that they check their personal devices and all phones for text messages that might be responsive. (*Id.*, p. 33:6-11.) The City takes no specific precautions to prevent PRA violations with respect to text messages. (*Id.*, 33:12-34:25.) Text messages related to City business, including Measure AA, are clearly "public records" under the PRA. However, not a single text message was produced to Sacks in response to her Measure AA PRA requests. (Sacks Decl. ¶196.) The City's designated PMK witnesses confirmed that they used text messaging as a method of communication, including regarding the Children's Initiative/Measure AA (Nosakhare Depo. 33:1-18; Silver Depo. 15:20-18:5;19:2-14; 19:23-20:1.) Silver admitted that he would delete his text messages approximately once a year, and "rarely" more frequently than that. (*Id.*) He claimed that he had "problems" with his phone, so a lot of his texts were "gone" or "lost" by the time discovery was conducted in this case. (*Id.*, 20:13-22:10.) Requests to those who might have responsive records did not include any specific direction to search private devices for responsive text messages. (Nokashare Depo. 13:17-14:20.) The City has no policies or procedures related to the need to preserve text messages as public records. (*Id.*) Given that Sacks received not a single text message in response to her Measure PRA requests, and given that such text messages likely existed, the City violated the PRA in not conducting a proper search for text messages, not preserving the next messages, and not producing those text messages.

4. The claim that documents related to Measure AA sent or received after April, 2018 did not constitute "public records" lacks merit.

As noted above, none of the PMK deponents were able to describe criteria on how to determine whether a document was allegedly created in a person's "personal" rather than "official" capacity. For the most part, they were not even aware of such a distinction. However, Silver claimed that the distinction depended on whether the documents were sent/received before or after the City Council declined to sponsor the legislation in April, 2018. (Silver Depo. 10:2-11:15.) However, such a distinction is at odds with the manner in which the City actually provided documentation. For example, Silver admitted that he likely would have seen the poll that was never provided to Sacks in response to her PRA requests. (*Id.*, 23:22-26:9.) That poll was conducted in October, 2017, and emails that were produced to Sacks referring to the poll results were from February, 2018, i.e., long before the City Council's decision not to sponsor the legislation. The emails referencing the poll results were provided to Sacks, but the poll itself was not, even though it clearly would have been in the constructive possession of both Silver and Schaaf. In addition, at least some material related to Measure AA was exchanged after April 18, 2018 using City email addresses, and it was sometimes exchanged during regular City work hours. Moreover, just because it would have been illegal for City employees to use City resources to "campaign" after April, 2018, this does not necessarily mean that every document referencing Measure AA after that date was not a public record. In addition, Sacks was absolutely entitled to documents reflecting whether employees were violating the law by campaigning using City resources.

B. The City Violated the PRA With Respect to the Raheem, Rania Adwan, and Knox & Ross PRA Requests.

The PRA requires the City to make such records "promptly available." Govt. Code § 7922.535(a), formerly Govt. Code § 6253(c). Here, the City did anything but that. Rather, the City employed a "we'll get to it when we get to it" approach. The PRA does not authorize such delay. While the meaning of prompt" may vary by circumstance, nothing justifies the City's delay in responding to Petitioners' requests. Its actions were beyond sluggish. Indeed, even after filing suit, the City still failed to respond to the PRA requests, and did not provide responsive documents except in response to discovery, more than a year later.

The PRA contains strict deadlines. An agency must determine whether a request, in whole or in part, seeks copies of disclosable public records within 10 days Govt. Code § 7922.535(a). Agencies must "promptly notify the person making the request of the determination and the reasons therefor." Only in "unusual circumstances" may an agency extend this deadline up to 14 days. *Id.* Once a determination is made, documents must be "promptly available."

While the PRA does not define nor prescribe an exact timeframe for production, a one-year delay is decidedly unprompt. (*Marken v. Santa Monica-Malibu* (2012) 202 Cal.App.4th 1250, 1268, n.14) (raising "serious questions" about one-month delay.)

Statutory construction begins with a law's plain language, affording the words their ordinary and usual meaning and viewing them in their statutory context. (*Poole v. Orange Cty. Fire Auth*. (2015) 61 Cal.4th 1378, 1384 (citations omitted).) Webster's defines "promptly" as "without delay; very quickly or immediately. See also Black's Law Dictionary (6th Ed. 1990) at 1214 (defining "[p]romptly" as "ready and quick to act as occasion demands"). The PRA thus requires agencies to produce documents "very quickly," "immediately," and/or "without delay," phrases that do not accurately describe the City's actions in this case.

Oakland's own administrative guidance supports Petitioners' reading. Oakland's own PRA training materials highlight the importance of providing documents promptly. (Sacks Decl. ¶199, Exh. 154.) And Oakland's City Administrative Instruction 106 instructs: "Public records should be provided to the requester at the time staff determines that the record will be disclosed, in other words, immediately when possible. If immediate disclosure is not possible, staff should provide an estimate in writing of when the records may be available and must provide the records within a reasonable period of time. (Sacks Decl. ¶ 194, Exh. 149, MS001423.)

This promptly-means-quickly interpretation is further supported the statute. The legislature has made plain that the speed of public disclosure matters. A lot. For example, Government Code § 7922.500 (formerly § 6253(d)) further provides that "nothing in this chapter shall be construed to permit an agency delay or obstruct the inspection or copying of public records."

Caselaw under the Freedom of Information Act ("FOIA") is also instructive. See *San Jose v. Sup. Ct*., 74 Cal.App.4th 1008, 1016 (1999) (FOIA caselaw may be used in construing PRA, which is

modeled after FOIA). FOIA, like the PRA, requires agencies to make a "records determination," and thereafter "promptly" produce documents. 5 U.S.C. § 552(a)(6)(A)-(C). FOIA likewise leaves "promptly" undefined. But courts have held that it typically "mean[s] not months or years." *Judicial Watch, Inc. v. United States Dep't of Homeland Sec*., 895 F.3d 770, 785 (D.C. Cir. 2018) (Kavanaugh, J.) (citation omitted). See also *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 616 (D.C. Cir. 1976) (FOIA requires "good faith effort and due diligence to comply with all lawful demands [for records]... in as short a time as is possible").

A short deadline is necessary because unreasonable delays in disclosing non-exempt documents violate the intent and purpose of the FOIA, and the courts have a duty to prevent these abuses." (*Payne Enlers, Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988) (quoting *Long v. IRS*, 693 F.2d 907, 910 (9th Cir. 1982).) By analogy, the same holds true under the PRA - documents delayed are documents denied - and the courts must prevent abuse.

Cases from other states are in accord. Arizona interprets "prompt" under its open records act to mean "quick to act" or "without delay." (*West Valley View, Inc. v. Maricopa County Sheriff's Office*, 216 Ariz. 225, 230 (Ariz. Ct. App. 2007).) Washington's interpretation is similar. *Storedahl Properties, L.L.C. v. Clark County*, 128 Wash. App. 1069 (2005) (considering Webster's and Black's Law definition), as is Ohio's, *State ex rel. Wadd v. City of Cleveland*, 68,9 N.E.2d 25, 28-29 (1998) (citing Black's Law). See also *Domestic Violence Servs. of Greater New Haven, Inc. v. Freedom of Information Comm'n*, 240 Conn. 1, 7 (1997) (three month delay was not "prompt.")

Applying the law to the facts here highlights the City's chronically abysmal responses. Sacks' initial PRA request regarding Raheem was dated August 27, 2020. (Sacks Decl. ¶ 27, Exh. 18.) The City provided no estimated response date of production, in violation of the "10 day rule." Even after sending a follow-up email about when she might receive responsive documents, she received no response. (*Id.*, ¶40, Exhibit 29.) Sacks sent multiple emails to various City officials regarding her ongoing concerns, but to no avail. (Sacks Decl. ¶36, Exh. 27, ¶, Exh. 28, ¶ 38, ¶ 39, Exh. 28, ¶ 40, Exh. 29; ¶ 41, Exh. 31; *Id.*, ¶44, Exh. 33). Request No. 20-6523, related to the Raheem documents, shows in the portal that Sacks received one document (the Raheem contract) on September 23, 2020 (nearly a month after the initial request), and that the due date for production of the remaining documents was eventually set for

December 1, 2020 (i.e., after she had already filed suit). (Sacks Decl. ¶ 82, Exh. 60.) After Sacks filed her writ petition, the due date was later changed to January 1, 2021. As of that date, she still had not received responsive documents. (Sacks Decl. ¶ 83.)

On March 24, 2021, Sacks received some responsive documents, and the due date for the remainder of the documents was set for June 30, 2021. (Sacks Decl. ¶ 84.) Additional documents were provided between April 1 and May 17, 2021. (*Id.*, ¶ 85.) As of February 7, 2022, according to the NextRequest Portal, the request for documents still showed as "open," meaning that she was still owed responsive documents. (Sacks Decl. ¶ 86, Exh. 60.) Eventually, she received responsive documents via discovery. Notably, there was many emails that were responsive to her CPRA request that were not produced to her through the NextRequest portal. Had she not conducted formal discovery, she would never have received those documents. (Sacks Decl. ¶ 87.) Ultimately, it took over a year, and a lot of active follow-up, litigation and discovery, to receive all responsive documents. (*Id.*, ¶ 88.) The City's defense for failure to promptly provide responsive documents was that, "Due to staffing transfers out of the department, the CPRA did not have a staff member to complete the outstanding production…." (Sacks Decl. ¶ 336, Exh. 164 - Responses to Special Interrogatories 23:17-24).

Sacks' requests related to the other illegal contracts were made via email on September 13, 2020 and September 22, 2020. On September 23, 2020, Sacks was advised that the City had uploaded her Rania Adwan request to the City's PRA "NextRequest" portal (Request No. 20-6524) and that responsive documents would be produced by December 1, 2020. (*Id.*, ¶ 89, Exhibit 61). The request for the Knox & Ross documents were uploaded to the NextRequest system (Request No. 20-6525) and the original anticipated production date was October 2, 2020. That date was later changed to December 1, 2020. A small quantity of responsive documents related to the Adwan contract was provided on October 6 and 8, 2020. With respect to Request No. 20-6524, no additional documents were provided by December 1, 2020, and no new estimated production date was provided. On March 24, 2021, an anticipated production date of June 30, 2021 was input into the system. (*Id.*) By June 30, 2021, no additional documents had been provided. As of February 7, 2022, the request still showed as "open" on the NextRequest system. (*Id.*)

Ultimately, Sacks did not receive all responsive documents to these requests except through

discovery. She finally received the last batch of responsive documents on or about November 19, 2021, i.e, 14 months after she originally requested the documents. (*Id.*, ¶ 91.) With respect to Request No. 20-6525, the City posted agendas and minutes from Police Commission meetings on October 28, 2020. (*Id.*, ¶ 92, Exh. 62). No additional documents were provided by the December 1 deadline, and the deadline was then extended to January 1, 2021. That date came and went, no additional documents were provided, and no new anticipated production date was provided. Nearly four months later, on March 24, 2021, the anticipated production date in the system was changed to June 30, 2021. That deadline came and went, and no additional documents were provided, even though Sacks had served discovery in February, 2021, which would have encompassed all responsive documents. (*Id.*, ¶ 93).

Ultimately, Sacks did not receive all responsive documents to this request except through discovery. She finally received the last batch of responsive documents on or about November 19, 2021, i.e, 14 months after she originally requested the documents. (*Id.*, ¶ 95.) According to interrogatory responses, the City's defense to taking over a year to respond to Sacks' PRA requests was that "Due to the numerous moving pieces of this litigation, and an oversight of counsel, Defendant did not order the IT searches until July 2021…." (Sacks Decl. ¶226, Exh. 164 - Special Interrogatory Responses p. 22:4-23:16). The City also blamed "staffing transfers out of the department." (*Id.*, p. 23:17-24:14). During his deposition, Alden admitted that the Commission's delay in responding to Sacks' PRA requests did not meet his "own personal standards," that responding to PRA requests was a "chronic problem," and blamed staffing shortages. (Alden Depo 25:17-26:25.)

Obviously, the City had no valid excuses for failing to produce documents in response to the PRA requests. The fact that Sacks tried to communicate with various City representatives to try to get them to comply, threatened litigation, and then ultimately filed suit, and still did not receive documents for nearly another year, demonstrates the complete disregard of citizens' constitutional rights to receive documents in a timely manner.

C. The City Failed To Comply With the PRA With Respect to Requests Submitted After Litigation.

Despite the fact that Sacks was actively litigating multiple violations of the PRA, the City continued to ignore her public records requests. She and ACTA made five PRA requests after the initial lawsuit

was filed. With respect to NextRequest No. 21-1445, it took nearly nine months for the City to provide responsive documents. With respect to NextRequest No. 20-6813, it took nearly two years. With respect to NextRequest No. 21-977, it took nearly five months. With respect to Next Request No. 21-10146, it took nearly 11 months. The most prompt response was to Request No. 22-111, which only took five weeks. But there, the City produced only one document, despite the fact that they originally claimed, as an excuse for the delay, that they needed to conduct a search of a voluminous number of documents. The fact that Petitioners were actively litigating against the City, and it still took up to two years to respond to modest subsequent PRA requests, demonstrates the chronic nature and gravity of the City's problems and legal violations.

VI. The City Has No System in Place to Ensure Compliance with the PRA.

The City all but admits that there is no system in place to ensure compliance with the PRA and Sunshine Act. (Sacks Decl. ¶ 226, Exh. 164 - Special Interrogatory Responses Set One 32:15-26.) Mark Forte, the Open Government Coordinator, was designated as the "person most knowledgeable" about compliance with the PRA. He testified that the City's system, such that it is, is "decentralized" and each department is individually responsible for responding to PRA requests. When asked what accountability there was for ensuring compliance, he answered that people can sue. (Forte Depo. 7:3-20). To his knowledge, no City employee has ever faced any consequences, including disciplinary action, other than one person in the City Attorney's office, for failure to comply with the PRA. He was unaware of any specific actions the City Administrator had taken to improve compliance with the PRA, other than hiring additional staff to respond to PRA requests directed to OPD, following lawsuits. (*Id.*, 8:8-9:1; 9:11-17; 14:11-15:25; 23:17-25:20). He was unaware of why it took two years to respond to Request No. 20-6813. He also did not know why it took nearly a year for the City to say that no responsive records existed in response to Request No. 21-10146. (*Id.*, 16:10-18:11; 18:12-20:11. He was unable to explain why, after Sacks wrote a message into the NextRequest portal on Request No. 21-9777 reminding the City that she had an active lawsuit and inquiring why the City couldn't manage to comply with the law, that message was ignored. (*Id.*, 28:21-29:21.)

Forte admitted that it is inappropriate to simply respond that the documents will be provided "on a rolling basis," and that an actual estimated production date is needed. (*Id.*, 20:12-21:5.) Forte admitted

that he was familiar with the findings of the May 2021 on PRA compliance conducted by the PEC, and admitted that pretty much every department in the City has trouble complying with the PRA. He was not aware of any action that the City Administrator had taken to address the deficiencies. (*Id.*, 25:22-28:10.) Forte admitted that despite the fact that Administrative Instruction 109 requires each department director to have an action plan for responding to PRA requests, he had never seen such a plan for any department other than his own department (the City Attorney's office) and OPD, which had been sued multiple times for PRA violations. (*Id.*, 35:1-14.) He also admitted most employees do not attend the trainings related to PRA compliance. (*Id.*, 33:12-34:25.)

The deposition testimony from the City Administrator Ed Reiskin demonstrated in the starkest fashion the complete lack of awareness about the gravity of the problem, the complete lack of regard for legal compliance, and an almost intentional desire not to address the problem. Specifically, Reiskin admitted that he was the one in charge of managing day-to-day City operations, including enforcement of the laws and PRA compliance. (*Id.*, 6:20-7:14.) However, his own department failed to respond to a request for nearly two years. Despite the fact that he was individually named as a defendant in this lawsuit where that deficiency was alleged, he claimed to have no knowledge of this problem, and could not explain why the problem happened. Even more shocking, he did not even know that the lawsuit alleged chronic failures with the Public Records Act. He agreed, however, that it was ultimately his responsibility to ensure that requests directed to his office were complied with, and that the City's response was not "prompt." (*Id.*, 8:9-25; 9:1-3; 11:4-9; 17:17-24.) He admitted that no consequences had been imposed on any City employees for their failure to comply with PRA obligations. (*Id.*, 12:21-13:7; 15:17-16:5.)

Reiskin claimed that he was unaware of the May, 2021 "Spotlight on Oakland's Public Records System" issued by the PEC. He stated that he was unfamiliar with the general findings that the City was doing an extremely poor job with respect to responding to PRA requests. (*Id.*, 16:6-16:24.) This was despite the fact that Sacks personally sent him an email dated May 24, 2021with a link to the report and alerting him to the findings. (*Id.*, 30:25-31:18.) He admitted that it was his responsibility to address deficiencies such as those identified in the report. (*Id.*, 16:25-17:16.) But the bottom line is that he was provided a copy of the report, never read it, and did nothing to address those obvious and chronic

deficiencies.

According to discovery responses received by the City, there were multiple pending lawsuits against the City for violations of the Public Records Act. One case, filed in Alameda County Superior Court, Case No. RG 20071657, resulted in the City losing the case on the merits in April, 2021. (Sacks Decl. ¶105, Exh. 69.) The City had to pay attorney fees in that matter in the amount of $125,204.50. Another case, also filed in Alameda Superior Court, Case No. RG 20072029, was settled in December, 2021. (Sacks Decl. ¶106, Exh. 70.) In that case, the City agreed to pay $127,500. In yet another case, the City agreed to pay $40,000 for additional PRA violations in December, 2021. (Sacks Decl. ¶243, Exh. 181). In 2021 alone, the City paid at least $290,000 to outside attorneys for CPRA violations, not taking into account the additional costs to taxpayers to have to pay for the City's own lawyers. Even these losses have not prompted the City to improve its compliance with the PRA. For example, the City has failed to comply with the settlement terms in Case No. RG 20072029, resulting in the plaintiffs filing a motion to enforce the settlement agreement in December of 2022. (Sacks Decl. ¶250.)

The City's chronic and ongoing failures to comply with the Public Records Act, which includes obligations enshrined by the Constitution, can only be described as willful. They are beyond negligent. The evidence presented here shows a large City that openly, flagrantly and repeatedly violates the law. It does so when presented with PRA requests submitted by a lawyer. And not just any lawyer – a lawyer with a pending lawsuit alleging multiple and overt PRA violations. And even when that same lawyer personally sends a copy of a report from the Public Ethics Commission outlining how dire the situation is, City-wide, to the City Administrator, the City Administrator does not bother to even read the document, let alone do anything to address the problem. And that same City Administrator, who was personally sued in this lawsuit, doesn't even bother to inform himself that the lawsuit involves chronic failures to comply with the PRA. That same City Administrator had a request sent to his department that was ignored for nearly two years. The City has imposed no discipline, has imposed no meaningful consequences for the ongoing violations of the PRA, and has taken no meaningful action to ensure the citizens' constitutional rights are protected. Given the ongoing, flagrant, willful, chronic and serious nature of the Constitutional violations, and given that the City has already been repeatedly sued and failed to do anything to correct the abuses, strong, detailed and direct court intervention is necessary.

VII. Schaaf And the Mayor's Office Violated O.M.C. Section 2.20.270 By Failing to Cooperate With The Public Ethics Commission Mediation Process (11th Cause of Action).

Oakland Municipal Code Section 2.20.270(c) provides: "Mediation. 1. Notwithstanding any other provision of law, any person whose request to inspect or copy public records has been denied by any local body, agency or department, may demand immediate mediation of his or her request with the Executive Director of the Public Ethics Commission, or some mutually agreed person who agrees to volunteer his or her time, serving as mediator. 2. Mediation shall commence no later than ten days after the request for mediation is made, unless the mediator determines the deadline to be impracticable. The local body, agency or department ***shall designate a representative to participate in the mediation***. Nothing shall prevent the parties from mediating any dispute by telephone. 3. The mediator shall attempt to resolve the dispute to the mutual satisfaction of the parties. The mediator's recommendations shall not be binding on any party. All statements made during mediation shall not be used or considered for any purpose in any subsequent or related proceeding." (Emphasis added).

On January 23, 2019, Sacks submitted a formal complaint to the PEC regarding the City's Measure AA PRA violations, and subsequently requested mediation. As of May 6, 2019, no mediation had been scheduled, in violation of requirement that mediation commence without 10 days. Kellie Johnson, representative for the PEC, responded to Sacks that they were finding it difficult to schedule the mediation and would coordinate with her to confirm the final date. Still, no mediation was ever scheduled. Sacks spoke to PEC staff, who advised her that they were going back and forth with the Mayor's office, and there seemed to be resistance with respect to their willingness to mediate or provide additional documents. Ultimately, no mediation was never held. On June 11, 2019, nearly six months after filing her complaint, Ms. Johnson told Sacks that the Mayor's office was not cooperating in communicating with her regarding the mediation and obtaining additional documents. (*Id.*, ¶ 121-122). Johnson wrote in her memo memorializing her efforts at mediation, "Staff has made multiple efforts, including obtaining a copy of the poll from the pollster company, to determine if the Mayor's office has/had responsive documents to no avail." (Sacks Decl. ¶ 202, Exh. 158). The memo also outlined the efforts Ms. Johnson had made to communicate with the Mayor's office and the designated PRA representative, Joanne Karchmer, that the Mayor's office was not responsive, and that the mediation was

being dropped "due to the Mayor's seemingly deliberate failure to timely respond and or produce complete responsive documents to the records request." (*Id.* ¶ 203-204.)

The designated PMK regarding mediation efforts, Shereda Nosakhare, testified during deposition that she could not answer why the Mayor's office was seemingly deliberately failing to cooperate with the mediation process. She was unable to answer why the Mayor's office never responded to Ms. Johnson regarding her inquiries. (Nosakhare Depo. 40:23-42:6.) She admitted that she was aware that the Mayor's office was required to cooperate, and was unaware that the Mayor's office did not cooperate until the matter was brought to her attention during the deposition. (*Id.*, 42:7-16.)

Special Interrogatory No. 38 asked the City to explain why the City/Mayor's office did not respond to the PEC's request to participate in mediation. (Sacks Decl. ¶226, Exh. 164.) The City provided a non-responsive answer, claiming, "Ms. Karchmer did respond to the public Ethics Commission's inquiries related to mediation and Petitioner's public records requests. However, PEC staff ultimately recommended to the PEC that the Commission close the mediation without further action because Ms. Karchmer reported that the production was complete and closed the public records request." This is completely at odds with the statement from Ms. Johnson that the Mayor's Office seemed to be deliberately failing to respond or produce responsive documents. It is also at odds with the comments Ms. Johnson made to Sacks and the fact that the mediation was never scheduled, many months after it had been requested.

It is clear from the language of the ordinance that participation in the mediation by the designated person (here, Ms. Karchmer) is not optional. It is mandatory. By failing to participate in the mediation efforts, as described in Ms. Johnson's reports, the City (i.e., the Mayor's Office) violated its own ordinance.

VIII. Petitioners Are Entitled to Declaratory, Writ and Injunctive Relief to Address The Violations Stated Herein, Obtain Withheld Documents, to Require The City to Develop Policies, Procedures, Training and Consequences to Ensure Compliance with the PRA, and to Address Violations of Bidding Procedures (9th-12th Causes of Action).

Declaratory relief is appropriate when there is an actual controversy involving justiciable questions relating to the party[s] rights or obligations. (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal. App. 4th 872, 909.) It serves to set controversies at rest before they lead to repudiation of obligations,

invasion of rights or commission of wrongs. In short, the remedy is to be used in the interests of preventive justice, to declare rights rather than execute them. Former Government Code Section 6258 (now Section 7923.000) provides that any person may institute proceedings for injunctive or declaratory relief to enforce the right to inspect or receive a copy of any public record.

CCP Section 526(a) provides that an injunction may be granted where "(1)…it appears by the complaint that the plaintiff is entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually; (2) When it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action. An injunction is prohibitory if it requires a person or agency to refrain from a particular act and mandatory if it compels performance of an affirmative act that changes the position of the parties. (*Oiye v. Fox* (2012) 211 Cal.App.4th 1046, 1048.) Here, Petitioners have no adequate remedy at law.

A writ of mandate "may be issued by any court ... to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station...." (Code Civ. Proc., § 1085, subd. (a).) A writ is appropriate when the public official or entity had a ministerial duty to perform, and the petitioner had a clear and beneficial right to performance. (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 539–540, superseded by statute on other grounds, *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd*. (2005) 35 Cal.4th 1072, 1084–1086; *Loder v. Municipal Court* (1976) 17 Cal.3d 859, 863. Mandamus is available to compel a public agency's performance or to correct an agency's abuse of discretion when the action being compelled or corrected is ministerial. (*Rodriguez v. Solis* (1991) 1 Cal.App.4th 495, 501.) "A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his [or her] own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists…." (*Id*. at pp. 501-502.)

As applied here, it is evident that the City has repeatedly violated the PRA with respect to over a dozen separate public records requests submitted by Petitioners since 2018. Based on the findings of the PEC report, the testimony of the PMK witnesses and Mr. Reiskin, as well as the fact that the City has recently spent several hundred thousand dollars settling other PRA lawsuits, it is evident that the

problem is systemic and chronic, and affects numerous PRA requestors aside from Petitioners. The citizens of Oakland are having their constitutional rights to receive public records in a prompt manner violated on a daily basis, and the problem has been going on for years. Without prompt access to public records, watchdog organizations like ACTA, and people like Ms. Sacks, cannot effectively act as watchdogs to ensure that their governments act in a legal, efficient and responsive manner. Ordinary citizens cannot gain access to documents that they are entitled to as a matter of right. The public officials involved here have demonstrated a manifest lack of regard for legal compliance and have no plan in place whatsoever to address the problems. Therefore, active and immediate court intervention is warranted to ensure that the City begins complying with the law. Due to the entrenched and severe nature of the problem, the court intervention should be specific and detailed.

Petitioners request that the Court specifically order the City to (1) ensure compliance with the 10-day response requirement under the PRA; (2) ensure that requestors receive an estimated date of production for responsive records (as opposed to being told that documents will be provided on a "rolling basis"); (3) ensure that the estimated date of production is realistic; (4) ensure that documents are provided to requestors in a truly "prompt" manner; (5) ensure that individuals who likely have responsive records be directed to promptly and thoroughly search for all responsive records, including for text messages and on personal devices and accounts; (6) ensure that documents such as text messages are not destroyed but rather are preserved in accordance with the City's records retention policies; (7) develop clear policies and procedures on distinguishing personal documents from public records; (8) ensure that City employees/officials conduct City business using City email addresses only, unless it is impracticable to do so; (9) ensure that City employees/officials refrain from conducting City business or communicating via text message, unless it is impracticable to do so; (10) ensure that City employees/officials not use personal email addresses, text messaging services or apps, personal devices, or other means of conducting City related business in order to thwart the purpose of the PRA; (11) ensure that the City shall conduct training annually for all departments, divisions, committees and commissions to review obligations under the PRA, including those outlined above; (12) ensure that the City and department heads cooperate with mediation through the PEC; (13) have the City turn over all other documents that it has not yet produced, either in response to Petitioners' PRA requests and/or

discovery requests, for an in camera review to determine which are public records, according to existing law, and order those produced to Petitioners; and (14) comply with PEC mediation requirements.

With respect to the illegal contracts, Petitioners request that the City grant injunctive, writ and declaratory relief, declare the contracts void, order the City to recoup the money paid pursuant to the illegal contracts, take other action to ensure that the City comply with its own bidding and contracting requirements in the future, and prevent and prohibit entering into wasteful contracts.

CONCLUSION

The evidence presented demonstrates that the City has for years been repeatedly and seriously violating the constitutional rights of its citizens for years by failing to provide public records in a prompt manner, and by relying on unsupported and illegal grounds for withholding documents. When confronted with these violations, the City initially refused to participate in mediation required by its own public ethics laws, and then, after it was sued, continued to violate the PRA in the most flagrant manner by continuing to ignore PRA requests, sometimes for nearly two years. The responses by City officials when confronted with these violations demonstrates a manifest disregard for the importance of complying with these laws. The evidence also demonstrates violations of clear ministerial duties with respect to compliance with public contracting requirements, by awarding contracts without informal solicitation of bids when this was clearly required, by awarding contracts to incompetent people for random prices, and by awarding contracts that were wasteful and provided no benefit whatsoever to the taxpayers. Therefore, Petitioners respectfully request that this Court grant the writ petition and order the relief requested, along with costs and attorneys' fees.

DATED: June 10, 2023

Law Office of Marleen L. Sacks

By: [redacted]

Marleen L. Sacks

Attorney for Petitioners/Plaintiffs

PROOF OF SERVICE BY EMAIL

Marleen L. Sacks and Alameda County Taxpayers' Association v. City of Oakland, et al.
Alameda County Superior Court Case No. RG 20078708

I am a resident of the State of California, over the age of eighteen years. My business address is [redacted]. On the date set forth below, I caused service of the foregoing documents:

- **Memorandum of Points and Authorities In Support of First Amended Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief**
- **Declaration of Marleen L. Sacks (Part 1) in support of First Amended Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief**
- **Declaration of Marleen L. Sacks (Part 2) in support of First Amended Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief**
- **Declaration of Marleen L. Sacks (Part 3) in support of First Amended Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief**
- **Declaration of Marleen L. Sacks (Part 4) in support of First Amended Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief**
- **Index of Exhibits in Support of Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief**
- **Notice of Hearing on First Amended Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief**

☐ **By United States mail**. The documents were enclosed in a sealed envelope or package addressed to the persons at the address(s)es listed below and *(specify one)*:
☐ The envelope was placed for deposit with the United States Postal Service, with the postage fully prepaid.
☒ **By email transmission**. Based on an agreement of the parties to accept service by email transmission, I sent the documents in PDF format to the person(s) at the email addresses listed below.
☒ **By e-service**. I submitted the documents for filing to an E-Filing Service Provider, which in turn files the documents and serves them via email at the e-mail address(es) listed below.
☐ **By messenger service.** I caused the documents to be served by providing the documents to the professional messenger for service to the address(es) listed below.
☐ **By overnight delivery.** The documents enclosed in an envelope or package provided by an overnight delivery carrier, for collection and overnight delivery, was deposited at an office or a regularly utilized drop box of the overnight delivery carrier, addressed to the persons at the address(es) listed below.
☐ **By fax transmission**. Based on an agreement of the parties to accept service by fax transmission, the documents were sent to the persons at the fax numbers listed in below.
☐ **By personal delivery.** I personally delivered the document(s) to the person(s) at the address(es) listed below.

[redacted]

Attorneys for Respondents

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 10, 2023, in Oakland, California.

[redacted]

Marleen L. Sacks